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December 1964

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Federal Tort Claims Act and Conflict of Laws†

*Roscoe Cross**

I. Recognition of Federal Liability In Tort

Sir William Blackstone, sometime Vinerian Professor of Law and Justice of His Majesty's Court of Common Pleas, has translated Bracton's Latin (albeit "freely") to read:

> The King is the vicegerent and minister of God on earth; all are subject to him; and he is subject but to God alone.[1]

Immunity of the individual sovereign from suit was a part of our jurisprudential inheritance from England. That concept or doctrine was a part of the bundle which included *Shelley's Case, Dumpor's Case,* estates tail, destructibility of contingent remainders, indefinite failure of issue, and other trappings peculiar to English feudalism. Along with those trappings, sovereign immunity appears to have been accepted by most jurisdictions of this country without serious question. In 1788, the conservative Federalist, Alexander Hamilton, wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.[2]

In *Cohens v. Virginia,*[3] Chief Justice Marshall observed:

> The Universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits.

And so from the earliest days of the republic, an aggrieved party's only method for redress against the federal government (in respect

†This article is based in part upon a paper presented by the author at the Southeastern Seminar on Government Claims and Procurement Law held February 6-8, 1964 by the University of Georgia Law School's Institute of Law and Government.

* Professor of Law, University of Mississippi.

[1] 1 Blackstone, Commentaries *241-42.

[2] The Federalist No. 81, at 508 (Lodge ed. 1899) (Hamilton).

[3] 19 U.S. (6 Wheat.) 264, 411-12 (1821).

to what would have been a civil claim against a private party) was by way of grace and petition, in pursuit of private or special legislation by the Congress.

A policy of sovereign immunity might well have been appropriate in the early cradling of the new republic. When the stability of our new republic seemed apparent and as the anthropomorphic aspects of sovereignty declined with the development of our concept of a democratic (or republican) type of government, doubts arose among some persons as to the necessity or propriety of blanket immunity of the sovereign with redress by grace. In 1832, John Quincy Adams expressed concern over such method of redress against the federal government. In 1855, a Court of Claims was established as an administrative body to examine claims and to make recommendations to the Congress for disposition—but still by private or special legislation by the Congress, if relief were to be afforded. The quantity of relief by private or special bills continued to increase. Lincoln criticized the situation and practice, by his Annual Message to the Congress in December, 1861. By 1863, the Court of Claims was empowered to adjudicate claims against the federal government in a limited area, from which tort claims were excluded. In 1887, the Tucker Act extended that court's authority a bit further but federal district courts were still denied jurisdiction over matters "sounding in tort." Over the succeeding decades there were a number of acts of the Congress which made special or limited inroads upon the doctrine of sovereign immunity of the federal government in the field of tort claims: Patent Infringement Act (1910); Federal Employee's Compensation Act (1916); Suits in Admiralty Act (1920); Small Claims Act (1922); Public Vessels Act (1925); and even an Oyster Bed Damage Act (1935). The burden of private claims was growing heavier upon the Congress and its claims committees in consequence of the ever widening range of federal impact upon, and participation in, the business and economic affairs and activities of the national community. During the period 1923-1944 (68th through 78th Congresses), some twenty-eight or twenty-nine bills were introduced by Senators and Congressmen for the purpose of establishing procedures whereby private parties might present and maintain claims for property damage and personal injury (and/or death) resulting from tortious conduct of federal personnel and agencies. None of these bills accomplished that objective.[4]

[4]For interesting accounts of the extended efforts to effect a waiver of federal sovereign immunity in the field of torts, see: Gootlieb, *Tort Claims Against the United States*, 30 GEO. L.J. 462 (1942); Gootlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1 (1946); McGuire, *Tort Claims Against the United States*, 19 GEO. L.J. 133 (1931); Yankwich, *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143 (1949).

At long last, the Federal Tort Claims Act became a reality by its enactment and approval on August 2, 1946, as Title IV of Public Law 601 of the 79th Congress. By that act (hereinafter sometimes referred to as "FTCA"), the United States of America purported to set aside its immunity from liability in tort, whenever the tort is "caused by the negligent or wrongful act or omission of any employee of the Government . . . .", but subject to the limitations and exceptions therein specified. That act, as presently amended, is set forth in various sections of Title 28, United States Code Annotated. For present purposes, the following sections, and excerpts from sections, of that title are hereafter set out:

. . . . . .

Sec. 1346. *United States as Defendant* [re jurisdiction]

. . . . . .

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, ... , for injury or loss of property, or personal injury or death *caused by the negligent or wrongful act or omission* of any employee of the Government while acting within the scope of his office or employment, *under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.* (Emphasis added.)

. . . . . .

Sec. 1402. *United States as defendant* [re venue)

. . . . . .

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

. . . . . .

Sec. 2401. *Time for commencing action against the United States*

. . . . . .

(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues . . . . [This subsection continues with provisions regarding a claim not exceeding $2500.00, including administrative steps not here pertinent.]

. . . . . .

Sec. 2402. *Jury trial in actions against United States*

Any action against the United States under section 1346 shall be tried by the court without a jury, ... [Then follows an exception unrelated to claims in tort].

. . . . . .

Sec. 2671. *Definitions*

As used in this chapter [*i.e.*, Chapter 171] and sections 1346 (b) and 2401 (b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

. . . . . .

Sec. 2672. *Administrative adjustment of claims of $2,500 or less*

The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $2,500 or less against the United States . . . , for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, *under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.* (Emphasis added.)

. . . . . .

Sec. 2674. *Liability of United States*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, *the law of the place where the act or omission complained of occurred provides,* or has been construed to provide, *for damages only punitive in nature,* the *United States shall be liable for actual or compensatory damages,* measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. (Emphasis added.)

. . . . . .

Sec. 2679. *Exclusiveness of remedy*

. . . . . .

(b) The remedy by suit against the United States as provided by section 1346 (b) of this title for damage to prop-

erty or for personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

. . . . . .

Sec. 2680. *Exceptions*

The provisions of this chapter [*i.e.*, Chapter 171] and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused.

. . . . . .

(d) Any claim for which a remedy is provided by sections 741-752, (*i.e.*, Suits in Admiralty Act), 781-790 (*i.e.*, Public Vessels Act) of Title 46, relating to claims or suits in admiralty against the United States.

. . . . . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

. . . . . .

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

There seems to be little legislative history as to the Federal Tort Claims Act, in the form in which enacted. Actually, it was enacted as "Title IV" of six titles gathered into the above mentioned Public Law 601, which is otherwise identified as the Legislative Reorganization Act of 1946.[5] The other five titles of the last mentioned act dealt with various matters which were of particular interest to many Members of Congress, and which embraced changes in the rules and committees of both Houses; provisions for congressional personnel, certain joint committees and the Congressional Record, the Capitol Building and pages; regulations of lobbying; policy regarding bridges over navigable waters; and finally, arrangements for compensation and retirement pay of Members of Congress. The Congress had long been prodded for

[5]Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812.

legislation to waive sovereign immunity to the point of recognizing liability in torts, as a general policy, but the proponents of such action seemed to be divided as to whether the resulting rights should be handled by an administrative agency (e.g., by the Comptroller General) or by the courts. There appears to have been little vigorous advocacy for or against Title IV (*i.e.*, FTCA) of the above mentioned reorganization act. Possibly, the general attitude and reaction of some Members of Congress have been fairly expressed by Senator John W. E. Thomas of Oklahoma, who is reported to have said in the course of Senate consideration of Senate Bill 2177 which became the Legislative Reorganization Act of 1946:

> Title IV relates to a code which would handle all claims, actions in tort, actions brought because of damages or injuries. I am not saying that that would not be beneficial. I have had no time to study this proposal, Mr. President, because, I have been serving morning, afternoon, and night on the floor of the Senate and in committees. So I have had no time and no chance to study this measure as it should be studied.[6]

In any case, FTCA came into being unfettered (and unsung) by extended committee explanations as to what it was intended to be or to accomplish. Subject to specific limitations provided, the United States accepted liability for the negligent or wrongful act or omission of an employee, et cetera, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (Refer to above quoted portions of sections 1346, 2672, and 2674 of Title 28, USCA.)

It seems fair to say that the Government's acceptance of liability in tort, as a general proposition, for negligent or wrongful act or omission was accomplished without shattering or devastating modification as to the substantive principles of the "internal" or "local" law of torts, as distinguished from conflict of laws rules. The avowed attempt to assimilate the liability of the United States in tort to that of the "private citizen" may have been motivated by a desire to avert the establishment of a new and superimposed federal law of torts. Without specific authorization by statute, the federal courts have extended assimilation by ruling, under FTCA, that the Government is answerable to insurers on subrogation claims[7] and to joint tortfeasors in contribution.[8] The federal courts have also applied a procedure for conducting a jury trial in respect of a private defendant while simultaneously affording

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[6] 92 CONG. REC. 6456 (1946) (remarks of Senator Thomas).
[7] United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1938).
[8] United States v. Yellow Cab Co., 340 U.S. 543 (1951).

a trial, without jury, in respect to the United States, for a common plaintiff who is claiming against both such defendants for the loss, injury, or death caused by their respective "negligence or wrongful act or omission."[9]

II. The Impact of Conflict of Laws Upon Federal Tort Claims

Suppose that P, a resident of State W, is injured in that state by the occurrence in that state of some negligent act of D who is also a resident of State W; and that P sues D in that state on account of the injury suffered by P. Disposition of P's claim will be accomplished in the state courts of State W under the local (*i.e.*, internal) substantive law of State W, without any concern for or reference to conflict of laws doctrines. In this situation, if FTCA brings in the United States as the defendant because the negligent act is committed in that state by a Government employee, then the same local substantive law of State W will be referred to by the federal district counts of that state and "applied" by them to accomplish disposition of the claim, according to that local substantive law.

Let us take a second hypothetical. Assume that P, a resident of State W, suffers injury in State X as the direct result of a negligent act committed in State Y by D who is a resident of State Z; and that P sues D in either State W or State Y, getting jurisdiction in personam over D. Under this hypothetical, there are multi-state aspects or ties in respect to the legal rights and obligations of the parties, with prospect that the local substantive law of the different states involved may be at considerable variance or in flat contradiction. In this circumstance, the forum must make a determination or choice as to the extent to which the law of any one or more of the states concerned, as above indicated, should be resorted to and utilized as basis for adjudication of the rights and obligations of the parties. Jurisdictions in this country have approached the conflicts problem of this second hypothetical on the basis that, by suffering the injury resulting from D's negligence, P has acquired what amounts to a "vested right," in the state where the injury is sustained. This vested-right concept is formally expressed as follows:

> The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place. The law of the place of wrong determines whether a person has sustained a legal injury.[10]

---

[9]Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir.), *rev'd mem.* 350 U.S. 907, *aff'd mem. sub nom.* United States v. Union Trust Co., 350 U.S. 907, *cert. denied,* Union Trust Co. v. United States, 350 U.S. 911 (1955), *modified and remanded on rehearing mem.*, 350 U.S. 962, *aff'd,* 239 F.2d 25 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 942 (1957).

[10]Restatement, Conflict of Laws §§ 377-78 (1934).

Such choice-of-law rule has been very widely accepted and applied by the state courts in this country, with respect to multi-state torts. One outstanding critic of this rule has stated, "The fact remains that American courts do in general 'apply,' or, rather purport to apply, the 'law of the place where the "harm" occurs' rather than of the 'place of acting.' "[11] And the Mississippi Supreme Court has said, "Our court has frequently held and we believe it is the rule everywhere, that actions in tort are governed by the law of the place where the injury occurred . . . ."[12]

While the law of the place of the wrong has been the dominating rule of decision in respect to multi-state torts, the law of the place of the act (or acting) has not been entirely ignored as another "vested right." By way of dictum in *Chicago, St. Louis & New Orleans R.R. v. Doyle*,[13] the Supreme Court of Mississippi declared, "Physical force proceeding from this State and inflicting injury in another State might give rise to an action in either State, and *vice versa* . . . ." In *Burkett v. Globe Indem. Co.*,[14] the defendant insurance company's insured (a garage in New Orleans) negligently left a tool under the hood of an automobile which the garage was repairing in that city, causing the steering gear to jam and the car to turn over in Alabama with resulting injury to plaintiff. Although defendant was not liable to plaintiff in Alabama (place of the injury), plaintiff was permitted to recover against the insurance company in the courts of Mississippi under the direct action statute of Louisiana (place of the act of negligence). As regards "interstate" (*i.e.*, multi-state) situations, with the "act" in one state and the "consequences" in a second state, Professor Cook has written:

> I am quite willing to say that it seems to me that it would be sensible to adopt whichever of the two (or more) domestic (*i.e.*, local or internal) rules is most favorable to the plaintiff. . . . If one rule is to be chosen, the "place of acting" rule of some continental systems seems to me at least as sensible as the "last event" rule, and in some cases easier to determine because of ambiguity in the words "last event."[15]

In 1949, a U.S. district court (D. C. Mass.) allowed recovery in consequence of defendant's wrongful acts in Massachusetts although the loss or injury sustained by plaintiff in Pennsylvania did not result in a

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[11]Cook, The Logical and Legal Bases of the Conflict of Laws 323 (1942).

[12]Welch v. Kroger Grocery Co., 180 Miss. 89, 94, 177 So. 41, 42 (1937). See also Pullman Palace Car Co. v. Lawrence, 74 Miss. 783, 22 So. 53 (1897).

[13]60 Miss. 977, 984 (1883).

[14]182 Miss. 423, 181 So. 316 (1938).

[15]Cook, *supra* note 11, at 345.

right of action in the latter state.[16] In 1957, the Minnesota Supreme Court also concluded that the law of the place of a prohibited act should be the rule of decision, although plaintiff had no right of recovery against the defendant under the law of the state where injury occurred.[17] Although there appears to be a paucity of court decisions in which the law of the place of the act (or acting) has been adopted as the rule of decision for multi-state torts, FTCA provides for liability on the part of the United States, in consequence of *"negligent or wrongful act or omission . . .* under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred."*[18] (Emphasis added.) Since venue under FTCA lies only in the judicial district (1) of plaintiff's residence, or, (2) wherein the act or omission complained of occurred, and in the absence of adequate legislative history of FTCA, the inferior federal courts were left with some uncertainty as to what might have been the legislative intention, if any, of the phrase, "in accordance with the *law of the place where the act or omission occurred."* (Emphasis added.) Whether by accident or design, FTCA clearly lays down a choice-of-law rule, but it fails to specify what law of the place of the act or omission is contemplated, in connection with multi-state torts. The question, as to what law was embraced by the above quoted clause, arose in *Landon v. United States*,[19] wherein the negligence of a government mail-truck driver inflicted, in New York City, injury upon the plaintiff, a New Jersey resident, who was covered by his employer in New Jersey under that State's Workmen's Compensation. Under New York law, a defendant in tort is entitled to have created upon judgment against him, the benefits obtained by plaintiff from his employer. In this case the Court of Appeals (2d Cir.) ruled that "law of the place where the act or omission occurred" included

[16]In Gordon v. Parker, 83 F. Supp. 40 (D.C. Mass. 1949), while plaintiff and wife were residents of Pennsylvania and continued to be through the trial, defendant's illicit relations with plaintiff's wife resulted in the alienation of her affections for plaintiff. Although Pennsylvania had abrogated its common law action for alienation of affections, plaintiff recovered upon the law of Massachusetts (place of the acts) which still had the common law action.

[17]In Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957), Minnesota's dram shop act provided that any person injured by an intoxicated person should have a right of action, for all damages, against the party which furnished the liquor causing the intoxication. Defendant hotel's bar in St. Paul furnished Sorrenson the liquor to the point of intoxication; and as the proximate result thereof, Sorrenson turned over an automobile being driven by him in Wisconsin and caused injury of plaintiff. Although there was no liability of the defendant hotel by the law of Wisconsin, it was held liable to plaintiff for the injuries sustained in Wisconsin.

[18]28 U.S.C. § 1346(b) (1958).

[19]197 F.2d 128 (2d Cir. 1952).

New York's conflict of laws rule under which New York would follow New Jersey's statutory provision under Workmen's Compensation that a defendant in tort cannot claim mitigation in damages for plaintiff's benefits from other sources. Then in the much adjudicated *Miller Cases*,[20] an Eastern Airlines airplane bound for Washington National Airport collided with another airplane over the District of Columbia in consequence of the negligence of a government employee in giving landing directions from his station in a control tower located in Virginia. That State had a $15,000 limitation on damages for wrongful death, while there was no limitation under the law of the District of Columbia. The lower court awarded $50,000 damages against the United States for the death of Ralph F. Miller. The Court of Appeals (D.C. Cir. 1910) concluded that "law of the place where the act or omission occurred" meant or referred to the internal law and only the internal law of Virginia, so that the damages were reduced to $15,000. Although this litigation was before the U. S. Supreme Court several times on petition for certiorari, it does not appear that any question was raised there, or, that the court took any notice of the rule of decision applied by the court of appeals, although one judge of the court of appeals dissented from the application of Virginia's internal law. Next in *United States v. Marshall*,[21] a government employee negligently shipped compressed gas, by rail from Ogden, Utah, destined for Seattle Port of Embarkation, without proper labeling on the shipment or in the bill of lading to disclose the nature of the shipment. After the shipment caught fire in Idaho and plaintiff responded to request that he help in handling the problem without knowledge of the hazardous nature of the shipment, he sustained injuries therefrom, in Idaho. In concluding that the law of the place of the injury (*i.e.*, law of Idaho) determined whether the United States was liable, the court of appeals construed "law of the place where the act or omission occurred" in the following language:

> The negligence of the United States occurred in Utah and the negligent condition created, continued into Idaho. . . . The omission to use care occurred in Idaho as well as Utah. Under the Tort Claims Act, the language quoted means the place where the negligence, either of act or omission, became operative, directly causing the injury and not places where the negligence existed but was then inoperative. . . .[22]

That is to say, the preceding quotation is merely another way of saying

[20]Eastern Air Lines, Inc. v. Union Trust Co., *supra* note 9. See also Cook v. United States, 274 F.2d 689 (2d Cir. 1960) for similar construction of "law of place where the act or omission occurred."

[21]230 F.2d 183 (9th Cir. 1956).

[22]*Id.* at 187.

that, "law of the place where the act or omission occurred," as specified in FTCA, is synonymous with "law of the place of injury or wrong." In other words that court concluded the doctrine still prevails that "the law of the place of wrong determines whether a person has sustained a legal injury."[23]

And then came the great calm. In *Richards v. United States*,[24] a passenger airplane of American Airlines crashed in Missouri on a scheduled flight from Oklahoma, killing all aboard. American Airlines paid or tendered directly to the personal representatives of each passenger killed, the sum of $15,000, which was the maximum recovery under Missouri's wrongful death statute, at the time. The personal representatives then sued the United States in Oklahoma under FTCA for additional damages, invoking the Oklahoma wrongful death statute which had no limitation or ceiling on damages. Contended that the United States, through the Civil Aviation Agency, had negligently failed to enforce the Civil Aeronautics Act and regulations thereunder to prohibit the practices and procedures of American Airlines on the fatal airplane at its overhaul depot in Tulsa. In affirming the lower court's dismissals of the suits against the Government, the court of appeals held that Oklahoma's wrongful death statute did not purport (nor was it intended) to provide a cause of action for wrongful death in another state; and that an action in Oklahoma courts, under the circumstances here, "is one for the enforcement of a right of action having its source in the law of the jurisdiction in which the wrongful death occurred."[25] That court further declared: "And this court is committed to the rule that where wrongful death occurs in one state and an action for damages is instituted in another, the law of the state in which the wrongful death occurred—not that in which the action was instituted—controls in respect to the maximum amount of damages which may be recovered."[26]

The Supreme Court of the United States affirmed the dismissals of the suits in the *Richards* case on the ground that the lower federal courts had interpreted "the pertinent Oklahoma decisions . . . to declare that an action for wrongful death is based on the statute of the place where the injury occurred that caused the death."[27] However, in a footnote on the last page of its opinion, the Supreme Court advised that the Oklahoma cases relied on involved claims wherein both negligence and injury occurred in the same sister state so that the lower courts had relied largely on dictum in those cases; but that

[23]RESTATEMENT, CONFLICT OF LAWS 378 (1934).

[24]369 U.S. 1 (1962).

[25]Richards v. United States, 285 F.2d 521, 525 (10th Cir. 1960).

[26]*Ibid.*

[27]Richards v. United States, 369 U.S. 1, 16 (1962).

petitioners here did not challenge the interpretation of the court of appeals and that the Supreme Court ordinarily accepts from courts of appeal the latter's interpretation of state decisions in such cases. Before arriving at affirmance however, the Supreme Court arrived at conclusions of far-reaching effect. It pointed out that in giving effect to the FTCA clause, "in accordance with the law of the place where the act or omission occurred," there were three alternatives urged by the parties for selecting applicable law: (1) the internal law of the place of the negligence; (2) the whole law (including choice-of-law rules) of the place of the negligence; or (3) the internal law of the place where the effect of the negligence took place. It concluded that in FTCA Congress used very precise language (by the above-quoted clause) to command application of the law of the place of the negligence; that federal courts were to give effect to it in multi-state tort actions; and that that clause required application of the whole law of the State where the act or omission occurred including its conflict-of-laws rules. The Court recognized that the general conflict-of-laws (*i.e.*, choice-of-law) rule of many States was to apply the law of the place of injury. However, the Court added:

> Recently there has been a tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation. We can see no compelling reason to saddle the Act with an interpretation that would prevent the federal courts from implementing this policy in choice-of-law rules where the State in which the negligence occurred has adopted it. Should the States continue this rejection of the older rule in those situations where its application might appear inappropriate or inequitable, the flexibility inherent in our interpretation will also be more in step with that judicial approach, as well as with the character of the legislation and with the purpose of the Act considered as a whole.
> In the absence of persuasive evidence to the contrary, we do not believe that Congress intended to adopt the inflexible rule urged upon us by the petitioners. Despite the power of Congress to enact for litigation of this type a federal conflict-of-laws rule independent of the States' development of such rules, we should not, particularly in the type of interstitial legislation involved here, assume that it has done so.[28]

From the above quoted observations of the Supreme Court in the *Richards* case, it is apparent that the court has given the green-light and its blessing to the "significant contact(s)" approach (also identified as the "grouping of contacts" or "center of gravity" basis) for choice of substantive law to be relied on for the rule of decision in

[28] *Id.* at 12.

disposition of tort claims with multi-state aspects. The "significant contact" approach (sometimes hereafter identified as "contacts approach") is bottomed on the proposition that place of act (negligence) and place of injury doctrines impose unjustified strictures upon the satisfaction of plaintiffs' tort claims with multi-state aspects; and that greater flexibility should be afforded the forum in making the choice of law in disposition of such claims. Upon such premises, the proponents of the contacts approach would have the forum assemble or identify the contacts or ties between the various states (*i.e.*, jurisdictions) and the harm, injury, loss, or damage sustained by the claimant; and then the forum will determine which state has the major, or vital, or significant contact(s), tie(s), interest, or what-have-you. The forum will thereafter turn to the substantive law of that state for the rule of decision to be applied by it in disposition of the litigation before it. Among the widely publicized cases which purport to exemplify that handling of the problem are *Grant v. McAuliffe*,[29] *Haumschild v. Continental Cas. Co.*,[30] *Kilberg v. Northeast Airlines*,[31] *Pearson v. Northeast Airlines*,[32] and *Babcock v. Jackson*.[33]

In the *McAuliffe* and *Haumschild* cases, defendant's negligence occurred and plaintiff's injuries were sustained in one state, but another state was the residence of all parties involved and provided the forum. In *McAuliffe*, plaintiffs were injured in Arizona by negligence there of defendant's testate who survived the accident but died several weeks later before suit was commenced against him. By Arizona law, tort actions are subject to the common law rule that they do not survive the tortfeasor. In California (the state of residence of all the parties), tort claims survive the tortfeasor; and plaintiffs sued defendant there, as administrator c.t.a. of the tortfeasor, who relied upon the Arizona law as his defense. In rejecting such defense, the California Supreme Court ruled that survival statutes "analogous to statutes of limitation which are procedural for conflict of laws purposes are governed by the domestic law of the forum." After stressing the major ties or contacts of the State of California with decedent to his death and with the administration of his estate, the court concluded that California law, which afforded a remedy by its survival statute, afforded the California courts full power over the debts and assets of the estate of decedent, including any claims which were valid against it by the law of California. In *Haumschild*, the husband and wife were domiciled in Wis-

[29] 41 Cal. 2d 859, 264 P.2d 944 (1953).

[30] 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

[31] 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

[32] 307 F.2d 131 (2d Cir.), *rehearsing en banc* 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

[33] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

consin, but the husband's negligence in California inflicted injury upon the wife, in California. Under the local law of California, the wife could not recover against her husband in tort; but under the law of Wisconsin a wife may recover against her husband in tort, when all aspects of the tort arise in Wisconsin. Since both husband and wife were domiciled in Wisconsin, they had more contacts and ties with Wisconsin than with California. So, Wisconsin domestic or internal law was applied in its entirety, and California law and any conflicts rules of Wisconsin were simply ignored. Before passing from *McAuliffe* and *Haumschild,* a relevant aspect of those cases should be noted. While there was a flat conflict between the domestic law of California and Wisconsin, and of Arizona and California, there was no conflict of *interest* between the two states in either pair. All parties to the litigation were residents of the state of the forum, in each instance, with the major contacts of their residence. In neither case did the forum's disposition of the claims by its own domestic rules result in any imposition or hardship to the other jurisdiction—or its residents. Consequently, the forum could well ignore or reject conflict of laws rules in situations where there was no actual conflict of interest, as in those two cases. They illustrate a special instance or application of the contacts approach.

Kilberg and *Pearson* arose out of deaths caused by the fatal crash of a Northeast Airlines passenger airplane at Nantucket, Massachusetts, in the course of a regular flight from New York City in 1958. Northeast, a Massachusetts corporation, was the tortfeasor which caused the crash. The statutes of Massachusetts limited recovery against common carriers (which included Northeast) to not more than $15,000; while the constitution of New York prohibited any limitation upon recovery for wrongful death. Thus there was a clear conflict of interest and of public policy, as between New York and Massachusetts. In each of these cases, the plaintiff, the decedent, and his family were all residents of New York from prior to the crash and continuing through the litigation; and Northeast was fully qualified to do business in New York and maintained offices and operations in that state, during the same period. Each of the decedents bought his ticket for passage from one of Northeast's offices in New York and went to his death as a result of the crash. By the traditional doctrine of "law of the place of injury," in conflict of laws cases, recovery in each case would have been limited to the Massachusetts maximum of $15,000. In *Kilberg,* the New York Court of Appeals developed the position that the substantive right of action was derived from the Massachusetts' law, but that the pecuniary limitation was "procedural" and so not binding on New York courts under widely accepted conflict of laws doctrines. While the classification was certainly subject to challenge (if it did

not fall into the category of plain double-talk), that court declared that New York's public policy, as expressed in the constitution of that State, prevented its giving effect to any Massachusetts limitation on recovery. A concurring judge also alluded to the significant contact afforded by the contract of carriage, in preference to the adventitious happening of the crash in Massachusetts. However fuzzy the court's reasoning might have been, it did arrive at the decision that the Massachusetts limitation on damages could have no application to the case. In *Pearson*, the United States Court of Appeals concluded that the court below had properly "applied the principles of New York conflict of laws enunciated in Kilberg and declined to recognize the Massachusetts limitation upon liability."[34] It further stated:

> We hold, however, that a state with substantial ties to a transaction in dispute has a legitimate constitutional interest in the application of its own rules of law. If indeed, those connections are wholly lacking or at best tenuous, then it may be proper to conclude that the state has exceeded its constitutional power in applying its local law.[35]

Then in 1963, came *Babcock* wherein the plaintiff was the guest passenger of her friends, the defendant and his wife, on a week-end motor trip to Ontario, from Rochester, New York, their common residence. The defendant negligently overturned his car in Ontario and seriously injured plaintiff. An Ontario statute completely exonerated the owner or driver of a non-commercial vehicle from any liability for injury to, or death of, any person being carried in such vehicle. Defendant would have been liable under New York's domestic law had the events taken place in that state. Defendant sought dismissal of plaintiff's New York suit on the ground that the law of the place of accident determined the rights of the parties and that the above mentioned statute in Ontario barred recovery. The New York court pulled all the stops to say that:

> The "center of gravity" or "grouping of contacts" doctrine adopted by this court in conflicts cases involving contracts impresses us as likewise affording the appropriate approach for accommodating the competing interests in tort cases with multi-state contacts. Justice, fairness and "the best practical result" . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.[36]

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[34]Pearson v. Northeast Airlines, 309 F.2d 553, 557 (2d Cir. 1962).

[35]*Id.* at 559.

[36]Babcock v. Jackson, 12 N.Y.2d 473, 481, 191 N.E.2d 279, 283, 240 N.Y.S.2d 743, 749 (1963).

A final case of *Gore v. Northeast Airlines*[37] cannot be overlooked. That case resulted from the same crash at Nantucket. Up to the death of the decedent, Gordon Dean, the circumstances and situation applicable were identical to those in *Kilberg* and *Pearson*. That is, Dean and his second wife and the two children of their marriage were domiciled in New York; he bought his ticket for passage at a New York office of Northeast; and the same crash caused his death. After his death and before suit, his widow and their two children moved to Maryland, where Gore was appointed executor under his will; and Gore later brought the suit in New York for the wrongful death, claiming damages of $1,750,000. The federal district court ruled that recovery was controlled by the $15,000 limitation of the Massachusetts law. This appears to have been justified on the ground that the only beneficiaries of New York's strong policy to ignore the Massachusetts limitation must be those dependents who continued to be domiciled in New York. Apparently, the court also assumed that the place of domicile at the time of the suit was *the* significant contact.[38] In terms of center of gravity, major contacts, et cetera, the result in the *Gore* case does not make much sense, as a practical matter. It can probably be justified in terms of hypothetical reasoning, but that is not the objective. What is needed is a workable approach in the cluttered area called "conflicts."

III. Conclusion

To begin with, it seems that a first heartening provision of FTCA is the provision of section 2401, *supra*, that the Federal government shall have its own statute of limitations for two years. For purposes of conflict of laws under FTCA, that arrangement has the virtue of cutting off all of the spurious argumentation over "procedural" or "substantive" as regards such statutes.

Under FTCA and the construction by the *Richards* case, the federal courts do not fashion nor apply their own conflicts rules but *start* with the conflict of laws rules (where pertinent) of the place of the act or omission, and NOT otherwise. Suppose that the claimant brings suit in tort against the Government in the judicial district of his residence, and that the court is not even in the same state in which any of the physical features of the accident occurred. Claimant's forum must look to the place of the act or omission to ascertain its conflict of laws rule, where pertinent. But, that place may refer claimant to the place of the injury, which in turn is a convert to the idea of significant contacts. One might find himself in orbital renvoi at most any moment. Presumably, the federal courts must take conflict of laws as they find

[37] 222 F. Supp. 50 (S.D. N.Y. 1963).
[38] *Id.* at 54.

it, but it should be remembered that, by virtue of *Pearson* or *Kilberg* on the one hand and *Gore* on the other, one jurisdiction may afford more than one rule. In addition, conflict of laws rules are not always obvious; they even may be non-existent in a particular case. In such situations the federal courts may undertake to foresee or forecast the conflicts rules. It is hoped that the result may be more in line with reality than was the case in *Collins v. American Auto. Ins. Co.*[39]

As a practical matter, it seems that the law of the place of injury is still the widely accepted choice-of-law rule in many jurisdictions, notwithstanding its so-called arbitrariness, and the law of the place of the act may also continue to be a valid choice-of-law rule. It is obvious that in situations comparable to *McAuliffe*, *Haumschild*, and *Babcock*, there is no conflict between the forum and the place of the accident. Therefore, the obvious conflict of laws rule should be that there is no conflict of laws rule, so that the forum is free to apply its own domestic law. The doctrine of significant contacts, alias center of gravity, alias grouping of contacts, probably has merit as a basis for "accommodating the competing interests" in multi-state torts. However, *Kilberg*, *Pearson*, and *Gore* do not seem to do much grouping or balancing of interest. Instead, they would seem to emphasize that *the* significant contact is the domicile of the plaintiff in the forum, so that conflict of laws may be ignored. It is hoped that the high expectations of the doctrine may improve with time.

[39]230 F.2d 416 (2d Cir.), *petition for cert. dismissed*, 352 U.S. 802 (1956).

SOME BASES OF PUBLIC UTILITY REGULATION

*A. J. G. Priest**

I. Introduction

Why regulation of public utilities?

Fundamentally, because utilities are natural monopolies to greater or lesser extents. Users of electricity, for example, normally cannot bargain with the company which provides service. Rates are fixed and no amount of chaffering will modify them. Those rates are established by governmental action, ordinarily through a regulatory commission which sits at the bargaining table with consumers on one side and investors on the other.[1]

Rober Arnebergh, then City Attorney of Los Angeles, wrote in 1957, "It is of course elementary that the prevailing philosophy in this country is to have public utility services rendered by monopolies. This so generally prevails that there would be no point in arguing for or against it. But all must recognize that where a necessity of life is provided by a monopoly, effective regulation of that monopoly is necessary to protect the public interest."[2] Just so!

The monopoly label is resisted, because many utilities are confronted with competition in depth and variety. Railroads, for instance, are required to meet strenuous (and often tax-subsidized) competition from trucks, buses, air lines, oil pipe lines, and carriers by water, not to mention the private automobile and other railroads. There was a time, however, when much of the American economy danced to the tune of steel wheels clickety-clacking over steel rails. Utility regulation first became imperative when the nation's railroads had throttling monopoly power and too often exercised it arbitrarily. Cornelius Vanderbilt's "The public be damned!" was an understandable reaction to a newspaper man's waspishness, but that outburst has been a useful tool for demagogues, as well as reformers, through more than half a century.

There can be no question about the non-competitive character of a substantial part of the utility services provided by water, communications, electric, and gas companies. When electricity is used thermally, it competes with gas, oil, coal, and even wood, but neither the oil lamp

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[1] See FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).

[2] Arnebergh, *Public Utility Regulation and the Community Interest,* 30 So. Cal. L. Rev. 191 (1957). See generally Barber, *Technical Change in American Transportation—The Role of Government Action,* 50 Va. L. Rev. 824 (1964).

nor the Welsbach gas mantle can seriously rival electric lighting. Nor will our omnipresent radio and television sets operate on kerosene. Natural gas is in a continuous struggle with other sources of energy. Telephone and telegraph companies are rivals and the postal department competes with both.

But despite the existence of certain competition, actual as well as theoretical, some alternative to price determination by the laws of supply and demand plainly is necessary. Regulation of rates and standards of service is the only technique we have evolved for dealing with the problem, short of that government operation which characterizes the planet's less enlightened areas. As an adopted Virginian necessarily exposed to the doctrines of Mr. Jefferson, this writer looks upon that alternative with nausea.

II. The Regulatory Agency: Scope and Jurisdiction

America's first significant regulatory agency, the Interstate Commerce Commission, was established in 1887.[3] And both federal and state commissions have proliferated widely since that date. Each of the states (except Alaska, which has provided for a commission still subject to further legislative authorization), as well as the District of Columbia and Puerto Rico, now has a firmly established agency authorized to regulate utilities. And such agencies normally have comprehensive powers. To be specific, only three such commisssions, those of Texas, Minnesota, and South Dakota, do not regulate the rates and service of electric utilities, while the Texas commission alone does not regulate telephone operations.

Many of the younger federal agencies regulating interstate aspects of public utility operations rank on a parity with the Interstate Commerce Commission in scope and influence. Among these major agencies are (1) the Federal Power Commission, which regulates the interstate movement of natural gas under the Natural Gas Act[4] and of electricity under the Federal Power Act,[5] (2) the Civil Aeronautics Board, which has comprehensive jurisdiction over civil aviation,[6] (3) the Federal Communications Commission,[7] which scrutinizes interstate telephone and telegraph operations, as well as radio and television, and (4) the Securities and Exchange Commission,[8] with broad authority under the Public Utility Holding Company Act over "integrated" public utility holding companies and their operating subsidiaries which generate,

[3] Ch. 104, § 11, 24 Stat. 383 (1887) (now 49 U.S.C. § 11 (1958).
[4] 15 U.S.C. §§ 717-717(w) (1958).
[5] 16 U.S.C. §§ 791(a)-825(u) (1958).
[6] 49 U.S.C. §§ 401-722 (1958).
[7] 47 U.S.C. §§ 1-609 (1958).
[8] 15 U.S.C. § 78 (1958).

transmit or distribute electricity or distribute gas. The Interstate Commerce Commissison itself has jurisdiction over interstate transportation by rail, trucks, buses, water carriers, and oil pipe lines.[9]

III. Adequate Service and Reasonable Rates are Basic

The basic purpose of public utility regulation is "to assure the furnishing of adequate service to all public utility patrons, without discrimination, and at the lowest reasonable rates which are consistent with the interests both of the public and the utilities."[10] Some commissions are better staffed and plainly more competent than others. Critics of regulation—some of them passionately uninformed—have been vehement from time to time, but utility regulation has played, and will continue to play, an indispensable part in the development of the nation's economy.

IV. Historical Development of Utility Regulation

It has been intimated that the serpent, whose fruit business seems to have been a natural monopoly and whose initial offering was made to half the world's then population (*Genesis* 3:1-7), was the first public utility operator. There is, however, no mention of public utilities in the entire Book of Genesis, although the regulation imposed on the frontier community of Eden was strict to the last degree.

The world's oldest code of laws, promulgated by Hammurabi about 2300 B.C., specifies the price at which a swift ship might be hired and also fixes the yearly rate for which a working ox could be rented,[11] while special obligations were imposed on carriers of goods even before the Law Mercantile began to be effective. Our Anglo-American utility law was grounded for three centuries on the declaration of Lord Chief Justice Hale, in his *De Portibus Maris*, that when private property is "affected with a public interest," it ceases to be *juris privati* only.[12] Our own Supreme Court expanded that concept in this frequently quoted language from *Munn v. Illinois*:[13]

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants

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[9]See Note 3 *supra*.

[10]Cassidy, *Public Utility Regulation in California*, Cal. Pub. Util. Code at 5 (West 1956).

[11]Text translated by C. H. W. Johns, and found in Johns, The Oldest Code of Laws in the World, 49-50 (1903).

[12]1 Hargrave Law Tracts 78 (1787).

[13]94 U.S. 113, 126 (1877).

> to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.

The recurring "affected with a public interest" was labeled "little more than a fiction" in one of Justice Holmes's notable dissents.[14] And that phrase was fully consigned to limbo in the New York milk control case, *Nebbia v. New York*,[15] which announced that it "can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."[16]

Mass transportation (by railroad, air line, bus, truck, taxi), communications (by wired or wireless telephone or telegraph), and electric, gas, and water service—all long-established, conventional public utilities—still head the list, but they represent only a few of the enterprises which may be brought to heel in the public interest. The courts have sustained, and probably will continue to sustain, legislative declarations of what a public utility is, unless the challenged enactment is almost crassly arbitrary and capricious.

There was a brief period in the 20's and 30's when the Supreme Court's conservative majority throttled economic and social experimentation with gusto. For example, Kansas was told that it could neither compel the arbitration of wage disputes nor regulate the processing of food, the manufacture of clothing or the production of fuel,[17] New York that it could not limit the prices of theatre tickets sold by a ticket broker,[18] New Jersey that it could not regulate the operations of employment agencies,[19] Tennessee that it had no power to determine intrastate gasoline prices,[20] and Oklahoma that it could not confer public utility status on the ice business.[21] This short era of judicial mayhem closed with the striking down of the National Industrial Recovery Act.[22]

But even before *Schechter*, Justice Roberts had turned from his more conservative brethren to speak for the five-to-four majority which upheld a New York statute establishing a milk control board with power to fix maximum and minimum retail prices, *Nebbia v. New York*.[23] Nine cents per quart was set as the store price. Nebbia, a Rochester grocer, sold two quarts of milk and a five-cent loaf of bread for eighteen cents.

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[14]Tyson & Brother v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

[15]291 U.S. 502 (1934).

[16]*Id.* at 536.

[17]Chas. Wolfe Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923).

[18]Tyson & Brother v. Banton, 273 U.S. 418 (1927).

[19]Ribnik v. McBride, 277 U.S. 350 (1928).

[20]Williams v. Standard Oil Co., 278 U.S. 235 (1929).

[21]New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

[22]A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[23]291 U.S. 502 (1934).

The New York Court of Appeals upheld a fine imposed on him for violating the control board's order.

The Supreme Court affirmed, saying that the Fifth and Fourteenth Amendments

> . . . do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. . . . There can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.[24]

Justice McReynolds wrote in vitriol on behalf of the four dissenting traditionalists:

> The legislature cannot destroy the guaranteed rights of one man with the prime purpose of enriching another, even if, for the moment, this may seem advantageous to the public. And this adoption of any 'concept of jurisprudence' which permits the facile disregard of the constitution as long interpreted and respected will inevitably lead to its destruction.[25]

Certainly the tendency toward administrative capriciousness was checked by the adoption of the Administrative Procedure Act.[26] Not less important, the right to "try novel social and economic experiments without risk to the rest of the country" demanded for the states by Justice Brandeis in his *Liebmann* dissent[27] has rarely been exercised since World War II. But when state experimentation comes, it will not be struck down by the Supreme Court. Any gambler willing to spend time and money in an effort to persuade that tribunal to scuttle such legislation would do better backing long shots at the nearest horse park.[28]

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[24]*Id.* at 525, 531, 537.

[25]*Id.* at 558 (McReynolds, J., dissenting).

[26]5 U.S.C. §§ 1001-11; revisions of this legislation likely to be substantial and strengthening may be adopted at the second session of the 89th Congress; see, in particular, S. 1663 as carefully revised by a sub-committee on Administrative Practice and Procedure of the Committee on the Judiciary.

[27]New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[28]*But see, e.g.*, General Alarm, Inc. v. Underdown, 76 Ariz. 235, 238-39, 262 P.2d 671, 673 (1953): "It was never contemplated that the [constitutional] definition of public service corporations . . . be so elastic as to fan out and include businesses in which the public might be incidentally interested . . . . The public interest contemplated depends on the nature of the business, the means by which it touches the public, and the abuses which may reasonably be anticipated if not controlled."

Any lingering doubts were dissipated seven years after *Nebbia*, in *Olsen v. Nebraska*,[29] a unanimous decision which upheld the constitutionality of a Nebraska statute providing for the regulation of employment agencies. This opinion expressly overruled the New Jersey employment agency case, *Ribnik v. McBride*.[30] Justice Douglas, writing for the Court, quoted the dissenting opinion in *Ribnik* and called the long roll of state and federal price-fixing legislation which had been sustained as constitutional. "We are not concerned," he said, "with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where . . . it was left by the Constitution—to the States and to Congress.' "[31]

Developments since *Olsen* do not suggest any change in the Court's approach.[32] Civil rights will be vigorously upheld, but what had seemed the constitutional right of at least certain businesses to operate without close administrative scrutiny has gone with the morning mist. That observation is not made critically. Most public utility representatives will not agonize over increasing business awareness of regulatory problems. Some concern may be expressed, but any tears shed will be strictly crocodilian.

Actual seizure of property for governmental use may be held to be beyond the peacetime reach of executive authority.[33] But if a Federal Steel Commission were set up to resist further inflation by fixing the price of ferrous metals, the Supreme Court could not be expected to prevent Congress from undertaking that experiment. The present Court might not uphold another project as broadly and determinedly socialistic as that launched by Kansas in the early 1920's.[34] And if, upon a modern presentation, the Court sustained the regulation of gasoline prices, some of its salty language in *Williams v. Standard Oil Co.*[35] would have to be masticated, but that suppression of price regulation was the product of an earlier dispensation and few lawyers would rely on it serenely at this writing.

V. Role of the Legislature in Controlling Administrative Agencies

Confidence ordinarily may be placed in legislative control over bureaucratic excesses. The public service commission, the milk board, and the workmen's compensation commission have only such powers

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[29]313 U.S. 236 (1941).

[30]277 U.S. 350 (1928).

[31]313 U.S. at 246, quoting from Ribnik v. McBride, 277 U.S. at 375.

[32]See Daneil v. Family Security Life Ins. Co., 336 U.S. 220 (1949).

[33]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the steel seizure decision).

[34]See note 17 *supra*.

[35]278 U.S. 235 (1929); see note 20 *supra* and accompanying text.

as the legislature has conferred upon them, expressly or by fair implication. And appellate tribunals characteristically have not allowed those fixed powers to be exceeded. There will be an earnest effort to give expression to legislative intent; the demarcation of statutory boundary lines will be clear and definite. It has been said flatly that a regulatory agency "derives its power only from the statute and has no authority except as is expressly conferred upon it."[36]

In his admirable *Trial by Agency,* Judge E. Barrett Prettyman of the United States Court of Appeals for the District of Columbia Circuit tells the administrative tribunals, "You, the agencies, are administering law."[37] He observes that administrative discretion is limited "to the four corners of the statute by which the Congress empowered the agency to act."[38] Then he says:

> What powers have the independent agencies? They have the powers granted them by law, and no others. They are not like the board of directors or the assembled stockholders of a corporation, which can do pretty much as they please in their own self-interest or in behalf of a cause, so long as they do not run afoul of the law or betray a trust. The agencies of government are either making, carrying out, or interpreting law. Those are affirmative functions, but they are limited by the very terms of the affirmation. The Supreme Court said of one of the great independent agencies, 'It is charged with the enforcement of no policy except the policy of the law.' And that sentence applies to every government authority. There can be no discretion outside the law.[39]

VI. Readiness to Serve the Public as a Criterion

Under the usual statute,[40] public utility status turns on whether a particular enterprise has held itself out as ready and willing to serve the public.[41] In that tradition, it has been held that an electric generating company which sold energy (at cost) solely to its three stockholders,

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[36]Chicago Rys. v. Commerce Comm'n *ex rel.* Chicago Motor Coach Co., 336 Ill. 51, 67, 167 N.E. 840, 847 (1929); Elyria Tel. Co. v. Public Util. Comm'n, 158 Ohio St. 441, 448, 110 N.E.2d 59, 63 (1953); Norfolk & W. Ry. v. Commonwealth, 143 Va. 106, 114, 129 S.E. 324, 326 (1925). See generally 43 Am. Jur. *Public Utilities and Services* § 193 (1942).

[37]Prettyman, *Trial by Agency* 8 (1959).

[38]*Id.* at 9.

[39]*Ibid.*

[40]See Television Transmission, Inc. v. Public Util. Comm'n, 47 Cal. 2d 82, 301 P.2d 862, 15 P.U.R.3d 496 (1956); *Re* Cokeville Radio & Elec. Co., 6 P.U.R.3d 129 (Wyo. Pub. Serv. Comm'n 1954).

[41]*E.g.,* Motor Cargo, Inc. v. Board of Township Trustees, 52 Ohio Op. 257, 258, 117 N.E.2d 224, 226 (Summit Co. C.P. 1953): "The principal determinative characteristic of a public utility is that of service to, or readiness to serve an indefinite public . . . which has a legal right to demand and receive its services or com-

two of them public utilities, was not itself a public utility;[42] that the publication by a telephone company of a "yellow pages" classified directory is not basically subject to regulation (there is, however, substantial authority to the contrary);[43] and that sellers of bottled gas (propane) are not engaged in a public utility service.[44] Arizona's supreme court has held recently that the Corporation Commission of that state could not require either lessors of automobiles driven and controlled by customers or a corporation engaged in collecting trash to obtain certificates of public convenience and necessity as "common carriers."[45]

Not every service performed by a public utility is necessarily public in character. Utilities may act in a private, as distinguished from a public, capacity. They may enter into agreements between themselves and with others free from state control—at least as to contracts with non-affiliates—so long as those contracts are not oppressive and do not impair the utility obligation. Public utility status should not be imposed on such "private" activities by either regulatory or legislative action, for certainly "the state does not enjoy the freedom of an owner."[46]

VII. Veracity as a Mutual Obligation

If the regulated accept regulation, honestly and completely accept it, they must be reconciled to the goldfish-bowl life. And those who conduct their operations behind glass walls not even tinctured with

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modities." Allen v. Railroad Comm'n, 179 Cal. 68, 88, 175 Pac. 466, 474 (1918): Public utility status arises out of "devotion to public use . . . of such character that the public . . . has the right to demand . . . that service shall be conducted, so long as it is continued, with reasonable sufficiency under reasonable changes."

Whether a water system is operated "for public use" depends upon *the character and extent of the use* and not upon understandings between the supplier and those supplied, the latter not having been "members of a restricted group." Lewandowski v. Brookwood Musconetcong River Prop. Owners' Ass'n, 37 N.J. 433, 181 A.2d 506, 513 (1962).

[42]*Re* Wisconsin River Power Co., 71 P.U.R. (n.s.) 91 (Wis. Pub. Serv. Comm'n 1947).

[43]McTegue v. New England Tel. & Tel. Co., 216 F.2d 26 (2d Cir. 1954); Felix v. Pennsylvania Pub. Util. Comm'n, 187 Pa. Super. 578, 146 A.2d 347, 26 P.U.R.3d 393 (1958); see Videon Corp. v. Burton, 369 S.W.2d 264, (Kansas City Ct. App. 1963), which discusses cases expressing both views.

[44]*Re* Oatman Bottle Gas Co., 78 P.U.R. (n.s.) 334 (Ind. Pub. Serv. Comm'n 1948).

[45]Mecham Pontiac Corp. v. Williams, 94 Ariz. 144, 382 P.2d 558 (1963); Visco v. State, 95 Ariz. 154, 388 P.2d 155 (1963). See, however, ICC v. Interstate Auto Shippers, Inc., 214 F. Supp. 473 (S.D. N.Y.), *aff'd*, 323 F.2d 367 (2d Cir. 1963), which declared that the Interstate Commerce Commission could regulate, and require certification of, a business providing drivers to transport automobiles to interstate designations through a "drive away" service.

[46]Northern Pac. Ry. v. North Dakota *ex rel.* McCue, 236 U.S. 585, 595 (1915);

opacity have a basic and primary obligation: they must tell the truth. That obligation is the major predicate for the Securities Act of 1933, called the Federal Truth-in-Securities Act, for the Securities Exchange Act of 1934, for the Public Utility Holding Company Act of 1935 and for related enactments of the earlier years of the New Deal.

All of that legislation is on the statute books to stay. No administration, however strongly conservative, would dare to tamper with it. If, for example, Senators Eastland and Stennis of Mississippi were elected joint Presidents of the United States, they would not seek to amend the legislation designated, even though they might undertake a vast deal else.

In a decision handed down within the year (*SEC v. Capital Gains Research Bureau*)[47] the Supreme Court said:

> A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry . . . . "It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail in every facet of the securities industry."

Those comments seem to be equally applicable to the regulation of public utilities. When regulation is accepted, as it must be, the regulated become bound to truth-telling as a fundamental rule of conduct and they must convince their regulators that they can follow no other course.

In the '30's and early '40's, when regulatory agencies, both state and federal, tended to be persecutors rather than prosecutors, those who represented utilities frequently discovered that their statements were suspect, that almost nothing they said was accepted at face value. The formula developed by this writer at the time should be effective now, especially with the commissioner who has just taken office believing that utility representatives come straight from the pit, still exuding an aroma of sulphur. It went something like this:

> Gentlemen, I am engaged in the practice of administrative law, particularly before this commission, as a livelihood. I have to keep coming back to you, week after week, month after month. Therefore, if I am even reasonably intelligent, I

Missouri *ex rel.* Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 289 (1923); State Pub. Util. Comm'n *ex rel.* City of Springfield v. Springfield Gas & Elec. Co., 291 Ill. 209, 231-32, 125 N.E. 891, 901 (1919); Georgia Power Co. v. Georgia Pub. Serv. Comm'n, 211 Ga. 223, 228-29, 85 S.E.2d 14, 19 (1954); Alabama Pub. Serv. Comm'n v. Southern Bell Tel. & Tel. Co., 253 Ala. 1, 23-25, 42 So. 2d 655, 674 (1949).

[47]375 U.S. 180, 186-87 (1963), quoting from Silver v. New York Stock Exch., 373 U.S. 341, 366 (1963).

> cannot and will not deceive you, mislead you, lie to you, or throw curve balls. If I do and am caught, my occupation will be gone; my usefulness will be at an end. And I do not intend to put my children's shoes in jeopardy. I think my morals are as good as the next man's, but this is not a matter of morals; it is a matter of intelligence. And if you think I am even normally bright, you are required to conclude that I cannot pull any wool over your eyes.

That is the only satisfactory basis for a decent relationship with the members and the staff of a regulatory agency. But of course the obligation is correlative. The commissioners and their staff must not throw any curve balls of their own. If, for example, a member of the Commission staff, after weighing the advisability of a proposed course of action, says, "Bill, I like what you have suggested and I will strongly recommend it to the Commission," he must do just that. Not a tentative recommendation or a luke-warm recommendation, but a strong recommendation. The Commission may not go along, but if the staff member with whom you dealt kept faith with you, he is not in the least subject to criticism. If, however, he was unwilling to stick out his neck as he promised and you hear about it, you will not rely again on that particular neck. It is suggested with conviction based upon experience that the public utility business is no place for a Caspar Milquetoast, either among the regulated or the regulators.

It used to be said of the Old Army—and perhaps it can be said of the New—that an officer was always under oath. That certainly should be true of the representatives of public utilities and of those who regulate them. The problems dealt with are entirely too consequential to permit of deviousness or deceit. Both the regulators and the regulated have accountings to make. They can make those accountings with unclouded consciences only if they will observe the simple admonition which has just been urged.

To be sure, this rule of conduct is occasionally flouted, even by lawyers. But the penalties can be severe in the case of lawyers: loss of respect, loss of practice, disbarment from the profession, destruction of a man's career. In the courses in Professional Ethics in most law schools, the basic exhortation is Tell the Truth. It is equally appropriate in the public utility business.

VIII. Discrimination: Bane of Regulators and Regulated

The Interstate Commerce Act, which was the first significant federal statute imposing some measure of regulation on public utilities, has as a primary purpose the prevention of discrimination in its various manifestations, and the evils arising out of undue preferences have been major targets of subsequent legislative action, whether by Congress or by the states.

Sections 7716-10 and 7716-11 of the Mississippi Code condemn rates which are "unreasonably discriminatory," while Sections 7716-08 and 7716-09 provide that a utility may employ "reasonable classifications of its service, patrons, rates, deposits, and service charges"; that such a classification may take into account the nature, quality and quantity of use, the time and purpose of use, and other reasonable considerations; that no utility shall collect "a greater or less compensation" than that set forth in its applicable, filed schedules and that no customer shall accept service for a compensation other than that prescribed.

Substantially similar provisions will be found in all state regulatory statutes. They ban discrimination as to every aspect of utility service, save only when differences singled out for criticism can be justified as due, just, and reasonable in the circumstances which surround them. A and B may be denied equal treatment only when their situations can be legitimately distinguished. And reasonableness obviously is the keystone of this particular regulatory arch.

These statutory provisions obviously express that allergy to preferential treatment which most citizens of the Republic would unhesitatingly acknowledge. And regulatory authorities have proceeded at full throttle to exercise their statutory power over discrimination. Furthermore, they have been consistently upheld by the courts.

Different treatment for different classes of customers who have been reasonably classified is not unlawful, but the variations must be substantial to justify such differences. In a word, Customer A may not be preferred over Customer B if they are receiving the same kind and degree of service. It has long been held that a mere difference in rates does not, in itself, constitute undue or unlawful discrimination.[48] Nor is there an established rule of thumb by which to determine whether conditions of service are similar or dissimilar when unreasonable discrimination is sought to be established. Such regulatory determinations are factual and must be made on a case-by-case basis.

IX. Conclusion: Acceptance and Functioning of the Regulatory Process

The public as well as the regulated must fully accept regulation. That acceptance will strengthen the regulatory process. But there is a further obligation. Legislatures should see to it that members of regulatory agencies receive longer terms of office—certainly ten years or more—and that they are adequately compensated. They plainly should

[48]Illinois Cent. R.R. v. Commerce Comm'n, 359 Ill. 563, 195 N.E. 32, 9 P.U.R. (n.s.) 106 (1935); State *ex rel.* Model v. Department of Pub. Serv., 199 Wash. 24, 90 P.2d 243, 29 P.U.R. (n.s.) 1 (1939); Grant-Pac. Rock Co. v. Southern Cal. Edison Co., 63 P.U.R. (n.s.) 484 (Cal. R.R. Comm'n 1946). See Wisconsin v. FPC, 373 U.S. 294, 307 (1963).

not be paid less than judges of courts of original unlimited jurisdiction; each of them obviously should be able to send his children to college and to own an appropriate home. And the salaries of important members of agency staffs should be within reaching distance—say $1,000 a year—of the commissioners' own brackets. The engineer, lawyer, economist, or accountant who makes regulation a career should have genuine tenure and should be paid enough to keep him on the job. His dedication to public service certainly should not penalize the man and his family.

Both regulators and the regulated should step on the aberrant notion that a public utility is "guaranteed" revenues which will cover all of its capital costs. That is not so. It is folklore. A utility has not more than an "opportunity" to earn the reasonable cost of conducting its business.[49] And in the celebrated *Hope Natural Gas* decision, Mr. Justice Douglas quotes the declaration of the *Natural Gas Pipeline* opinion that "regulation does not insure that the business shall produce net revenues."[50] As Francis X. Welch has observed, ". . . the utility's return allowance might be compared to a fishing or hunting license with a limit on the catch. Such a license does not guarantee that the holder will catch anything at all; it simply makes the catch legal (up to a specified limit), provided the holder is successful in his own efforts."[51]

Where inefficiency or improvidence or economic waste or abuse of discretion or action inimical to the public interest have been demonstrated, the agency having jurisdiction may intervene. Business decisions are, however, the prerogative of management. Regulators are not the masters of public utility enterprises. They may, and often should, breathe down the executive's neck, but the basic responsibility is his, not theirs.

It has been suggested that regulators may, and often should, breathe down the utility executive's neck, but the basic responsibility falls upon him and his directors. One story seems apposite in that connection: Kinsey M. Robinson, president of the Washington Water Power Company, was on the stand before the Washington Commission some twenty years ago. He was being cross-examined by an opposition lawyer who asked suddenly and sourly, "Mr. Robinson can you sit there and say that you really think you are worth $40,000 a year?" Robinson replied, "Oh, no, I don't. But my directors do. And who am I to question their judgment?" That probably *is* where the buck stops.

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[49]Missouri *ex rel.* Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 290-91 (1923) (Brandeis, J., concurring).

[50]320 U.S. 591, 603 (1944), quoting with approval FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 590 (1942).

[51]Welch, Cases on Public Utility Regulation 454 (1961). See generally Priest, *Discrimination, Bane of Regulators and Regulated, Pub. Util. Fort.*, Aug. 13, 1964, pp. 19-34.

Do You Have a Products Liability Case? †

*Gibson B. Witherspoon**

I. Introduction

Certainly there is more history being made now in the area of products liability than in any other field of torts. Twenty years ago few such cases found their way into our courts. However, there has been a complete change in the concept of our law, which may be traced to our changing political philosophy, such as protecting the general public through social security, war on poverty, and other similar legislative measures. Modern tribunals lean toward imposition of liability upon the manufacturer, regardless of the number of intermediary channels through which the product reached the consumer. The prestigious American Law Institute in May, 1964, recognized that the privity dam has broken and "approved the extension of strict liability products beyond 'for intimate body use.'"[1] Over thirty-six decisions hold that there is no essential reason why strict-privity-free tort and warranty liability should not extend beyond food, drink, and drug products. The argument is that strict liability should not be limited to consumers and users but should be extended to include such plaintiffs as a mechanic servicing a defective automobile,[2] or a guest in a car.[3]

If you have a products liability case, the question of liability will probably be left to a jury. The average jury verdict for personal injury actions was reported recently to be $11,473.00, while the average verdict for all product cases was over twice as much, $25,879.00.[4] This is particularly adequate when it is considered that this includes all food cases, where the average recovery is less than $5,000.00. Many cases are very small in recovery, as where $100.00 was allowed when a minor became ill after discovering a roach in a waxed milk carton from which he had consumed a glass of milk (no analysis was made of

† A similar article by this author appeared at 5 B.C. Ind. & Com. L. Rev. 585 (1964).

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[1] Restatement (Second), Torts § 402A (Tentative Draft No. 10, approved May, 1964).

[2] Connolly v. Hagi, 24 Conn. Supp. 198, 188 A.2d 884 (Super. Ct. 1963).

[3] Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 391 P.2d 168 (Sup. Ct. 1964). Warranty of personal property for purchaser only Pease & Dwyer Co. v. Somers Planting Co., 130 Miss. 147, 93 So. 673 (1922).

[4] Research Incorporated, Figures from Jury Verdicts.

[5] Pierson v. Borden Co., 159 So. 2d 567 (La. Ct. App. 1963). See also Coca-Cola Bottling Co. v. Savage, 228 Miss. 612, 89 So. 2d 634 (1956).

the milk).[5] According to the same authority,[6] during the first three months of 1963, more breach of warranty cases were tried than during the entire two previous years.

II. Historical

"The assault upon the citadel of privity is proceeding in these days apace"[7] has been an often quoted passage of Judge Cardozo in products liability cases during the past 38 years. The first case which opened the great assault upon the citadel of privity was decided in 1916 and held: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger,"[8] and the manufacturer should be held liable without any privity of contract. The doctrine of the *MacPherson* case has been extended slowly, but each decade produces other crumbled and wrecked fortifications of the citadel's defense. Judge Cardozo's famed opinion has had more influence in products liability cases than any other landmark in American jurisprudence. Imposing liability without privity of contract was an entirely new and novel theory that was as breath-taking as the cosmos presented by Einstein. His renaissance opinion elevated him to the unshared summit of Olympus while his contemporaries stood still in the shadows of the foothills, clinging to the armchair concept of privity of contract.

The extension of liability includes property damage,[9] even where the damage is caused by products such as animal food, which involve no recognizable risk of personal injury.[10] Parties who have been protected, in addition to the purchaser, are his employees,[11] members of his family,[12] subsequent purchasers,[13] bystanders,[14] those in the vicinity of its probable use,[15] and other users of the product.[16] As defendants, the doctrine has been extended to include makers of component parts,[17] assemblers of parts,[18] those who put their names upon goods made by

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[6]Research Inc., *supra* note 4.

[7]Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441, 445 (1931).

[8]MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1053 (1916) Consumer recovered where glass found in drink purchased by friend, Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

[9]Gosnell v. Zink, 325 P.2d 965 (Okla. 1958).

[10]Dunn v. Ralston Purina Co., 38 Tenn. App. 229, 272 S.W.2d 479 (1954).

[11]Rosebrock v. General Elec. Co., 236 N.Y. 227, 140 N.E. 571 (1923).

[12]Baker v. Sears, Roebuck & Co., 16 F. Supp. 925 (S.D. Cal. 1936).

[13]Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (1915).

[14]McLeod v. Linde Air Prods. Co., 318 Mo. 397, 1 S.W.2d 122 (1927).

[15]Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928).

[16]Lill v. Murphy Door Bed Co., 290 Ill. App. 328, 8 N.E.2d 714 (1937).

[17]Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576 (1932).

[18]Sheward v. Virtue, 20 Cal. 2d 410, 126 P.2d 345 (1942).

others,[19] sellers,[20] repairmen who do work on chattels,[21] contractors, in most jurisdictions,[22] and suppliers.[23] Bailors, donors, and gratuitous lenders are, however, still held to have no duty to inspect before delivery of the chattel, and they are liable only for a failure to disclose defects of which they have knowledge which may be dangerous to a third person.[24]

After the Federal Food and Drug Act was passed in 1906 and after the elections of 1912, when conservative politicians were defeated across the nation, the theory was advanced that the public must be protected against big business. Strict liability to a consumer was applied first in the state of Washington in December, 1913.[25] A few months later, Mississippi applied the strict liability theory where there was an implied representation that a soft-drink was safe.

> A 'sma' mousie' caused the trouble in this case. The 'wee, sleekit, cow'rin,' tim'rous beastie' drowned in a bottle of Coca-Cola . . . [The consumer] did not get joy from the anticipated refreshing drink. He was in the frame of mind to approve the poet's words:
>
> 'The best-laid schemes o' mice an' men
> Gang aft aglay
> An' lea'e us nought but grief an' pain,
> For promis'd joy!'[26]

An exception to the general rule occurs where the user, because of his professional experience, should have been aware of an existing danger. In such an instance the producer will not be held liable. This situation has arisen often with regard to the sale to physicians of medicine, supplies, and equipment. It has been consistently held that the physician should have known the dangerous nature of the product and need not have been warned.[27]

The author participated recently in a case where it was alleged that a blood bank had supplied blood without sufficient warning of the dangers to those who had had numerous transfusions. It was held by

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[19]Swift & Co. v. Hawkins, 174 Miss. 253, 164 So. 231 (1935).

[20]Jones v. Raney Chevrolet Co., 217 N.C. 693, 9 S.E.2d 395 (1940).

[21]Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013 (1932).

[22]Wright v. Holland Furnace Co., 186 Minn. 265, 243 N.W. 387 (1932).

[23]Nelson v. Fruehauf Trailer Co., 11 N.J. 413, 94 A.2d 655 (1953).

[24]*E.g.*, Johnson v. H. M. Bullard Co., 95 Conn. 251, 111 Atl. 70 (1920).

[25]Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

[26]Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 868-69, 64 So. 791 (1914). The implied warranty of wholesomeness runs with the sale of the drink and passes with the title, Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97 (1925).

[27]*E.g.*, Parker v. State, 280 App. Div. 157, 112 N.Y.S.2d 695, *appeal denied*, 304 N.Y. 989, 109 N.E.2d 474, 115 N.Y.S.2d 311 (1952).

the trial court, where the patient had a violent reaction, that since the blood bank delivered blood to physicians and hospitals as ordered, it was the doctor, not the blood bank, who had a duty to warn the patient. This case was not appealed, but was settled by the doctors who were sued jointly for negligence.

III. The Present Trend

Since 1915 the emphasis has been shifting from *"caveat emptor"* toward protection of the buyer or "ultimate consumer." Indeed, it is now the manufacturer who must beware *("caveat venditor")* if his product proves defective.[28] One leading writer has set forth three theories upon which liability of a manufacturer may be based: "(A) negligence, (B) breach of implied warranty or breach of duty independent of the contract to provide a fit product without respect to fault, and (C) breach of an express warranty."[29]

Recent decisions indicate the adoption of a policy by the courts requiring manufacturers to stand behind inducements to the public to buy. Sometimes these representations constitute express warranties made in letters, in personal conversations by an agent or manufacturer, whether made on a label, in a brochure, or in newspaper, radio and television advertising. The liability in cases not involving a warranty depends on negligence. The obstacle to recovery generally is not the substantive law as to the duty or causation but the unavailability of sufficient evidence of negligence to have the case submitted to the jury. Liability on the basis of an implied warranty is not so strict or absolute that it justifies a recovery on the part of a user who merely shows that injury was suffered in the course of a use, or shortly after a use, which he attributes to the products. With ever-increasing frequency, a problem posed to the courts is whether the manufacturer is liable for physical harm suffered by a plaintiff who is supersensitive or allergic.[30] In such a case, a plaintiff must show that there were an appreciable number of people allergic to some substance in the product which produces the injury and that the plaintiff was in this class. Generally, proof of an injurious reaction is insufficient because the plaintiff may have had a temporary or unusual condition. Where a deodorant was used, it was shown that a certain number of people were allergic to aluminum sulfate used in the product and that plaintiff suffered injuries from it. The plaintiff had no further burden in order to make out a case for the jury. The burden shifted to the manufacturer to indicate that proper warnings and instructions had been given, or to excuse his ignorance.[31]

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[28]The National Observer, Jan. 14, 1963, p. 1, col. 1.

[29]Keeton, *Products Liability—Proof of the Manufacturer's Negligence,* 49 Va. L. Rev. 675, 676 (1963).

[30]Bonowski v. Revlon, Inc., 251 Iowa 141, 100 N.W.2d 5 (1959).

[31]Wright v. Carter Prods. Inc., 244 F.2d 53 (2d Cir. 1957).

(This type of negligence does not, of course, extend to retailers.) "The suggestion for a test is this: A product is not fit for the general purpose intended, if a reasonable man with full knowledge of all the properties and the danger therein, would continue to market the product because the utility of its use outweighs the dangers."[32] Where two children were innoculated with a polio vaccine and later contracted polio as a result of the active poliomyelitis virus, the court properly imposed liability in finding the vaccine not to be wholesome and therefore neither merchantable not fit for its intended purpose.[33]

One might ask why should the manufacturer of food and drugs be held to such strict liability without fault? The best answer is found in Judge Traynor's opinion: "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."[34] In a more recent opinion, Chief Justice Charles S. Desmond stated that the purpose of imposing strict tort liability on a manufacturer, regardless of privity, is "to see to it that the costs of injuries resulting from defective products are borne by the manufacturers who put the products on the market rather than by injured persons who are powerless to protect themselves . . . ."[35]

Based on this concept, a plaintiff who used a hair dye suffered a systemic reaction of a violent nature. An ingredient in the defendant's product had been known to cause skin reactions in a number of cases. Plaintiff had used this dye every six weeks for two and one half years. Doctors for both sides agreed that the cause of plaintiff's dread disease was unknown. Never in medical history had plaintiff's disease been associated with any hair dye. It was held in this case that a jury could find that defendant's product caused the injury.[36] In another case a Texas plaintiff was injured when a charge of dynamite exploded prematurely during a drilling operation. The dynamite was being handled by a fellow servant who was killed. This charge of dynamite was composed of three different elements—each manufactured by a different defendant. Negligence was not proved, nor was the plaintiff able to show that defects existed in any of the three elements. The court said

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[32]Keeton, *Products Liability—Current Developments,* 40 TEXAS L. REV. 193, 210 (1961).

[33]Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960).

[34]Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (concurring opinion). See also Hadley v. Hillcrest Dairy, Inc., 341 Mass. 624, 171 N.E.2d 293 (1961).

[35]Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963).

[36]Braun v. Roux Distrib. Co., 312 S.W.2d 758 (Mo. 1958).

that the explosion spoke for itself and was sufficient in itself to raise a jury question as to whether one or more of the defendants should be liable.[37]

IV. Foreseeability of Danger

One of the most widely expanding areas of liability arises out of the manufacturer's duty to warn. Although the defendant's product may be perfectly made, it may be dangerous to some consumers in either normal use or foreseeably abnormal use. The manufacturer is usually said to have a duty to warn the public of whatever danger there may be. To be effective the warning must be communicated to the ultimate consumer, and not merely to the retailer. This duty to warn depends, therefore, upon the foreseeability of the danger to the consumer.

Apparently, there has been very little or no difficulty in applying the foreseeability theory in the courts. In one case a plaintiff applied a balm to his chest and then put on his pajamas. The vapors, which had accumulated between his chest and pajama tops, burst into a flash flame when he lighted a cigarette. There was no warning on the label, and it was shown that the balm would not ignite at an ordinary temperature. It was indicated by the evidence that combustion was made possible only because of the air space between the pajamas and the plaintiff's body. The court held that the manufacturer had a duty to warn the plaintiff of the explosive nature of the fumes of the product since it was foreseeable that the consumer would smoke with clothing on after applying the balm.[38]

Where a threshing machine had over its blades a catwalk of such thin metal that the weight of a normal man caused its collapse, it was a simple matter to place the liability upon the maker.[39] Plaintiffs have recovered where the inherent danger appeared in the course of the ordinary use of the products, such as in the cases where a party dress was ignited upon the touch of a cigarette,[40] a grinding wheel flew apart while revolving at the prescribed speed,[41] and a refrigerator exuded carbon monoxide.[42] There are cases, however, which are complicated, technical, and where foreseeability rests in the dim twilight zone.

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[37]Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960).

[38]Martin v. Bengue, Inc., 25 N.J. 359, 136 A.2d 626 (1957). See Hardman v. Helene Curtis Industries, Inc., 48 Ill. App. 2d 42, 198 N.E.2d 691 (1964), where the plaintiff, six years old, sprayed hair solution on her hair and dress. She lit a candle and there was a flash fire. The court held that such a use was not so unusual that it could not have been foreseen by the manufacturer.

[39]Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir. 1903).

[40]Noone v. Fred Perlberg, Inc., 268 App. Div. 149, 49 N.Y.S.2d 460 (1944), *aff'd per curiam*, 294 N.Y. 680, 60 N.E.2d 839 (1945).

[41]Tomao v. A. P. De Sanno & Son, 209 F.2d 544 (3d Cir. 1954).

[42]Beadles v. Servel Inc., 344 Ill. App. 133, 100 N.E.2d 405 (1951).

Where the plaintiff is able to establish that a product is dangerous in its ordinary use and that no warning of its danger was given, a presumption arises in favor of the plaintiff that the defendant has knowledge of the danger. This presumption, with proof of causation and injury, completes the plaintiff's prima facie case and the burden of going forward with the evidence shifts to the manufacturer-defendant to prove his faultless ignorance of the danger of his product to everyone who might use it.[43]

The manufacturer will not be free from liability if he issues the required warning to a retailer who does not pass it along to the ultimate consumer.

V. Explosion of Containers

While there are many possible causes for containers exploding, the most common seem to be: (1) defects caused by mishandling of the container by the manufacturer, distributor or others, (2) defects in the container when manufactured or a failure to inspect and discover such irregularity, (3) excessive contents of the container or overloading, which does not leave air space for expansion, and (4) misuse of the container by the customer-plaintiff. Most of the modern cases simply submit the case to the jury on the basis of evidence of careful conduct on the part of the plaintiff and intermediate handlers after the delivery of the product.[44]

We do not find where a court has mentioned time as being a factor in the determination of liability, but courts have commented on the fact that the product has been purchased or delivered a short time before the explosion.

> When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, then the injury arose from the defendant's want of care.[45]

Exclusive control as used in this case means that the defendant must have had control of the container at the time of the negligent act which gave rise to the injury. A plaintiff, whose right hand was injured when a glass jar of pigs' feet exploded, sued multiple defendants and relied solely on res ipsa loquitur. There was no allegation in the declaration

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[43]Sylvania Elec. Prods., Inc. v. Barker, 288 F.2d 842 (1st Cir. 1955), *cert. denied,* 350 U.S. 988 (1956).

[44]*E.g.,* Evangelio v. Metropolitan Bottling Co., 339 Mass. 177, 158 N.E.2d 342 (1959).

[45]Johnson v. Coca-Cola Bottling Co., 239 Miss. 759, 765, 125 So. 2d 537, 539 (1960). See Gabriel v. Royal Prods., 159 So. 2d 384 (La. 1964).

that the jar had not and could not have been tampered with between the time it left the control of the packer and the date of the accident. Apparently, no attempt was made to trace the jar from the time it left the packer until it came into the possession of the plaintiff. A demurrer was sustained. The court said that allegations of these circumstances were necessary to permit a jury to infer negligence as the cause of the injury to the plaintiff.[46]

VI. The Duty to Warn and Directions for Use

Some time ago laws were enacted which require proper labeling of insecticides, fungicides, and rodenticides. In 1960 another act was passed which requires proper labeling of any product that is toxic, corrosive, irritant, strongly sensitizing, flammable, or which generates pressure through heat combustion or other means. All containers of toxic substances must be labeled, "DANGER-POISON," and the symbol of a skull and crossbones must also appear.[47]

Some products are harmful to a relatively small number of allergic consumers. In one case a manufacturer who sold eighty-two million jars of a deodorant received 373 complaints of dermatitis among consumers. The court held that there was no need to change the ingredients, but there was a definite duty to warn "those few persons who it knows cannot apply the product without serious injury."[48] If the manufacturer has actual knowledge of the harmful characteristics of any ingredient, there is a clear duty to warn.

The adequacy of the warning is sometimes determinative of liability. Merely listing the ingredient "naphtha" on a label was held not to be an adequate warning that the solvent was highly explosive.[49] Likewise, an admonition to keep a smoke-making machine away from the face does not adequately warn of flame danger.[50] A caution that alkalinity of Bondex might irritate tender sensitive skin—use paddle for mixing—was not sufficient to warn plaintiff who lost an eye when paint was accidently brushed in his eye. The court held that the warning could be construed by the jury as an assertion that the only danger in the use was that it might slightly irritate tender skin after prolonged contact.[51]

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[46]Huggins v. John Morrell & Co., 176 Ohio St. 171, 198 N.E.2d 448 (1964).

[47]Federal Hazardous Substances Labeling Act, 74 Stat. 372 (1960), 15 U.S.C. §§ 1261-73 (Supp. V, 1959-63).

[48]Wright v. Carter Prods., Inc., *supra* note 31.

[49]Standard Oil Co. v. Lyons, 130 F.2d 965 (8th Cir. 1942). Where manufacturer's guarantee removed from washing machines, buyer justified in refusing delivery, Chatham v. All Am. Sales, Inc., 213 Miss. 88, 56 So. 2d 42 (1952).

[50]Larramendy v. Myres, 126 Cal. App. 2d 636, 272 P.2d 824 (Dist. Ct. App. 1954).

[51]Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958).

Important also are the pamphlets and directions for use which accompany the product. A plaintiff applied "Tag" to his famed Albemarle County orchard to eradicate fungus and lost his entire crop. The court held that the warning must be directed toward those dangers which are reasonable and foreseeable, including the hazards of the object itself. Deviation from the directions is considered a foreseeable contingency. "The fact that directions are overlooked or are not meticulously followed does not relieve the manufacturer of the duty to warn of latent dangers common to a class of articles."[52]

The manufacturer's product may be perfectly made but still be dangerous to some consumers in normal use or abnormal use which is foreseeable. Where a 210 pound shipment of drill steel allegedly contained explosive which detonated and killed the purchaser, the court held that the supplier's duty to warn of the presence of an explosive continued "at least" until actual delivery.[53] A label stated that a hammer was "unbreakable," but a sliver of steel flew off, resulting in loss of the plaintiff's eye. The jury's award for damages was sustained.[54]

VII. Changes Under the Uniform Commercial Code

Twenty-nine states, including our neighbors, Arkansas and Tennessee, have enacted the Uniform Commercial Code. In time, it is hoped that all commercial transactions will be governed by the greatest code ever promulgated by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Every commercial transaction is covered by this modern legislation. When Mississippi and the remaining twenty states enact the Code, the absolute liability theory, toward which most courts have been rushing, will be checked and modified in at least three instances:

(1) *Warranties, Expressed or Implied*:

Under section 2-607(4) of the Code, the burden of proof of any breach of warranty is upon the buyer. Plaintiff's evidence must prove:

(a) existence of a warranty in his favor, either expressed or implied;

(b) a breach of that warranty by defendant, including proof that the product was defective when sold and that the product was harmful when used as directed;

(c) that the proven defect was the proximate cause of the injury to plaintiff;

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[52]McClanahan v. California Spray-Chem. Corp., 194 Va. 842, 75 S.E.2d 712, 718 (1953). See also Grey v. Hayes-Sammons Chem. Co., 310 F.2d 291 (5th Cir. 1962).

[53]Higginbotham v. United Iron & Metal Co., 228 F. Supp. 513 (W.D. Mo. 1964).

[54]Singer v. Walker, 250 N.Y.S.2d 216 (App. Div. 1964).

(d) that plaintiff relied on defendant's warranty;
(e) notice to the defendant of the breach of warranty within a reasonable time.

Where a seller prepared a brochure for the buyer setting out the tasks a helicopter could perform and showed movies of the uses to which it could be put, and where the machine was unable to perform a designated task and the buyer was unable to complete the task successfully with another model used by a competitor, the court held a warranty of fitness to be implied as a matter of law since the seller knew the particular use for which the helicopter was purchased. The court held that evidence supported the jury's finding of breach of the implied warranty and affirmed a judgment for $180,295.00 for pecuniary loss. The defendant's general disclaimer of "all other warranties" under the Uniform Commercial Code was not effective to eliminate the warranty of fitness.[55]

(2) *Statute of Limitations*:

Section 2-725 delineates a special statute of limitations based on both sales and contracts of sales for breach of warranty and limits such actions to a four-year period.[56] In some Code States, there is also a provision that the parties by agreement may reduce this period of limitation to not less than one year.

(3) *Privity of Contract Doctrine*:

The Code also relates to the privity of contract doctrine. Under the Code, only those named third party beneficiaries to whom the warranty is deemed to extend can bring a direct action for breach of warranty, expressed or implied, against the seller. After a decade under the Code in Pennsylvania, their supreme court refused to extend the benefits of warranty beyond a purchaser in the distributive chain.[57] Therefore, there is no warranty implied in favor of one who is not in the category of a purchaser.[58] The Code, by restricting the class of potential plaintiffs, as well as by not enlarging the class of potential defendants (Section 2-318), has given rebirth to the privity of contract doctrine.[59]

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[55]Boeing Airplane Co. v. O'Malley, 329 F.2d 585 (8th Cir. 1964). *Compare* Webster v. Blue Ship Tea Room, Inc., 198 N.E.2d 309 (Mass. 1964), *with* Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960).

[56]See Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1964); The Practical Lawyer, April 1964, p. 61.

[57]See Loch v. Confair, 361 Pa. 158, 63 A.2d 24 (1949).

[58]See, *e.g.*, Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963).

[59]See Barnard v. Pennsylvania Range Boiler Co., 216 F. Supp. 560 (E.D. Pa. 1963).

VIII. Conclusions

Where res ipsa loquitur is permitted, the accident must have been one that would not normally occur without negligence. The instrumentality or force causing injury is required to have been under the management and control of the defendant.[60] A plaintiff is not even required to identify the particular questionable conduct of the defendant.

It is still held, however, that where the danger is apparent, there is ordinarily no duty to warn;[61] whether the plaintiff should know of the danger must be determined with regard to the experience of the class of persons likely to use the product.[62] Thus a cement product may be dangerous when distributed to an average household consumer who is not familiar with the dangers of lime.[63] However, a similar preparation, distributed to a person in the building trade who knows lime's caustic qualities, needs no accompanying warning.[64] The modern trend seems to be to require a manufacturer to warn the customers of familiar hazards and even anticipate the forgetfulness of customers expected to use the product.

The manufacturer's duty to warn depends upon the foreseeability of the danger. The experts, who assist in the manufacturer or assembling of the product, should know all possible dangers of its use. Certainly, one of the most widely expanding areas of liability arises out of this manufacturer's duty to warn and indicate the directions for use.

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[60]Sitta v. American Steel & Wire Div. of United States Steel Corp., 254 F.2d 12 (6th Cir. 1958).

[61]See Nishida v. E. I. DuPont De Nemours & Co., 245 F.2d 768 (5th Cir. 1957), *cert. denied*, 355 U.S. 915 (1958).

[62]See Parker v. State, *supra* note 27.

[63]Haberly v. Reardon Co., *supra* note 51.

[64]Katz v. Arundel-Brooks Concrete Corp., 220 Md. 200, 151 A.2d 731 (1959).

State Bar Section

FIRST AMENDMENT RIGHTS AND RESTRICTIONS*

The problems involved in restricting the recognized freedoms of speech and press are often complex, and through the years there have been divergent views among jurists as to the extent of protection which these freedoms require. While the first amendment establishes freedom of religion, the right of peaceable assembly, and the right to petition the Government for redress of grievances, this paper seeks to deal primarily with the freedoms of speech and press, and more specifically with the danger to the society when these rights are unconditionally protected. An attempt will be made to survey the transition that is occurring in the position of the Supreme Court in respect to the extent of protection afforded to individuals whose rights of free speech and press are questioned. Particular attention will be directed to the attitude of the Court toward the freedoms as they are applied to the activities of Communist Party sympathizers.

In *Blackstone's Commentaries*[1] the following appears:

> AMENDMENT I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or of the right of the people peaceably to assemble, and to petition the Government for redress of grievances.
>
> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure from criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. . . . But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating or making public of *bad sentiments, destructive of the ends of society*, is the crime which society corrects. (Emphasis added.)

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An address delivered to the Duke University School of Law on April 10, 1964.

[1] 4 BLACKSTONE, COMMENTARIES *151-52.

These comments are but declarations of the common law of Blackstone's day. There is no reason to believe that there was any intention by those who prepared the first amendment to change that law. The 1780 Constitution of Massachusetts guaranteed free speech; however, during 1799 and 1803 we are advised of at least three convictions for political libels. The 1790 Constitution of Pennsylvania and the 1792 Constitution of Delaware each imposed liability expressly for *abuse* of the right of free speech. Jefferson wrote Abigail Adams on September 11, 1804 and touched upon the "Sedition Act" in this manner:

> Nor does the opinion of the unconstitutionality and consequent nullity of that law remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood in the U.S. The power to do that is fully possessed by the several state legislatures. It was reserved to them, and was denied to the general government, by the constitution according to our construction of it. While we deny that Congress have a right to controul the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so.[2]

Justice Frankfurter in his concurring opinion in the case of *Dennis v. United States*[3] in 1951 observed:

> "The law is perfectly well settled," this Court said over fifty years ago, "that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions which continued to be recognized as if they had been formally expressed."

Until recently, it was not thought that the adoption of the fourteenth amendment changed the situation. In 1907 Mr. Justice Holmes remarked that the Court was leaving undecided the question of whether there is to be found in the fourteenth amendment a prohibition similar to that in the first.[4] In 1922, Justice Pitney stated: "[N]either the Fourteenth Amendment nor any other provision of the Constitution of the

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[2]Dennis v. United States, 341 U.S. 494, 522 n.4 (1951) (concurring in affirmance).

[3]341 U.S. 494, 524 (1951) quoting from the opinion in Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

[4]Patterson v. Colorado, 205 U.S. 454, 462 (1907).

United States imposes upon the States any restriction about 'Freedom of Speech' or the 'Liberty of Silence' . . . ."[5]

There came about, in the course of the many decisions under the first amendment, a doctrine which has become familiar as the "Clear and Present Danger" Rule. Prior to the birth of this phraseology, the Court held in 1890[6] that a statute of the Territory of Idaho providing punishment for one who teaches, advises, counsels, or encourages persons to be bigamists or polygamists is constitutional. The Court talked at length about the purity of the marriage relation and the necessity for maintaining the family. There was no talk about the necessity for showing that the prohibited teaching, counseling, advising, etc. must be shown to have occurred in circumstances creating a clear and present danger of its being followed.

The "Clear and Present Danger" test first saw the light of day in *Schenck v. United States*,[7] decided in 1919. The appellants had been convicted of conspiracy to violate the Espionage Act of 1917, by conspiring to print and circulate a paper addressed to men called and accepted for military duty. The circular was said to tend to create insubordination and generally to obstruct the recruiting and enlistment services of the United States. The appellants were convicted in the trial court. When the matter reached the Supreme Court, Justice Holmes, speaking for the Court said:

> The character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[8] (Emphasis added.)

Justice Holmes was again speaking for the unanimous Court in *Frohwerk v. United States*[9] when he said that the first amendment was obviously not intended to give immunity for every possible use of language.

The common law prohibited speech of a "dangerous tendency." Now, the Court is speaking in terms of a "Clear and Present Danger" situation. In the *Gitlow* case,[10] Gitlow was convicted under a New

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[5]Prudential Ins. Co. of America v. Cheek, 259 U.S. 530, 543 (1922).
[6]Davis v. Beason, 133 U.S. 333 (1890).
[7]249 U.S. 47 (1919).
[8]*Id.* at 52.
[9]249 U.S. 204, 206 (1919).
[10]Gitlow v. New York, 268 U.S. 652 (1925).

York statute, making it criminal to advocate, advise, or teach the duty, necessity, or propriety of overturning organized government by force or violence. The record reflects no evidence as to the effect resulting from the Manifesto circulation for which he was convicted. No contention was made that it created any immediate threat to the security of the state. Thus, the Court was obliged to reach a clear-cut choice between the common law test of "dangerous tendency" and the "clear and present danger" test. It adopted the former and sustained the conviction, saying:

> By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power . . . . That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear.[11]

It is most interesting to observe that in a dissenting opinion for himself and Justice Brandeis in *Gitlow*, Justice Holmes made these comments:

> If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and the incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.[12]

The Court then considered *Whitney v. California*.[13] There the evidence tended to establish the existence of a conspiracy to commit certain serious crimes. A conviction was unanimously sustained. Justice Brandeis, joined by Justice Holmes, wrote a concurring opinion and

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[11] *Id.* at 668-69.

[12] *Id.* at 673 (dissenting opinion).

[13] 274 U.S. 357 (1927).

restated the test of "clear and present danger" with the additional ingredient that there would be the intent to create such danger:

> [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.[14]

The application of the "clear and present danger" test resulted in holding unconstitutional a Chicago ordinance judicially interpreted to permit punishment for breach of the peace which "stirs the public to anger," invites dispute, or brings about a condition of unrest. This was held to be an undue and unlawful restriction of the right of free speech.[15] In commenting in this case, Justice Douglas stated:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and pre-conceptions and have profound unsettled effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[16]

Justice Jackson wrote a dissent in which he pointed out that the evidence showed that a riot had actually occurred and the speech in question had, in fact, provoked a hostile mob, incited a friendly one, and threatened violence between the two. He added that because a subject might be legally arguable would not necessarily mean that public sentiment would be patient of its advocacy at all times and in all manners. "A great number of people do not agree that introduction to America of communism or fascism is even debatable."[17] He also stated that many speeches, such as that of Terminiello, might be legally permissible but nevertheless in some surroundings be a menace to peace and order. When such conditions show the speaker that this is true, as Justice Jackson found to be the case here, there certainly comes a

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[14]*Id.* at 373, 377 (concurring opinion).

[15]Terminiello v. Chicago, 337 U.S. 1 (1949).

[16]*Id.* at 4.

[17]*Id.* at 33 (dissenting opinion).

point beyond which he cannot indulge in provocations to violence without being answerable to society.

In 1951 in *Feiner v. New York*,[18] the Court upheld a conviction of a speaker who in addressing a crowd, including a number of the members of the Negro race, through a public address system set up on the sidewalk, asserted that the Negroes "should rise up in arms and fight for their rights," called a number of public officials, including the President, "bums," and ignored two police requests to stop speaking. The Supreme Court took cognizance of the findings of the trial court and two reviewing state courts that danger to public order was clearly threatened.

The "clear and present danger" rule has broadened the common law limits of freedom of utterance insofar as discussion of judicial proceedings is concerned. Probably the leading case on this is *Bridges v. California*.[19] Justice Black enlarged upon the idea that clear and present danger is an appropriate guide in determining whether comment on pending cases can be punished. He stated:

> [W]e cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases.[20]

In 1947 a divided Court held that publication, while the motion for a new trial was pending, of an unfair report of the facts of a civil case, accompanied by intemperate criticism of the judge's conduct was protected by the Constitution.[21] The Court observed that the vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an immediate, and not merely a likely, threat to the administration of justice. Added comment was that such language must "immediately imperil." The fact that the danger might be remote or even probable was not sufficient.

The question has arisen as to whether or not freedom of speech and press occupies a "preferred position" in the constitutional hierarchy of values so that legislative restriction of it is presumptively unconstitutional. Justice Cardozo in 1937 classified this constitutional right as the "matrix, the indispensable condition, of nearly every other form of freedom."[22] He added that the domain of liberty, withdrawn by the

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[18]340 U.S. 315 (1951).
[19]314 U.S. 252 (1941).
[20]*Id.* at 271.
[21]Craig v. Harney, 331 U.S. 367 (1947).
[22]Palko v. Connecticut, 302 U.S. 319, 327 (1937).

fourteenth amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action.

Thereafter, the Court has held that our system of government places upon the Court the duty of saying where the individual's freedom ends and the state's power begins. "Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."[23] The Court added, through Justice Rutledge, that any attempt to restrict those liberties must be justified by clear, public interest, threatened not doubtfully or remotefully, but by clear and present danger.

The next question concerns the quality and purpose of the speech which the Constitution aims to protect. In the *Terminiello* case we pointed out Justice Douglas's answer to this question. However, in 1951 Justice Jackson urged the Court to review its entire position in the light of the proposition that "The purpose of constitutional protection of speech is to foster peaceful interchange of all manner of thoughts, information and ideas."[24] He pointed out further that cities throughout the country have adopted permit requirements to control private activities on public speech and for other purposes. The universality of this type of regulation demonstrates a need and indicates widespread opinion in the profession that it is not necessarily incompatible with the constitutional freedoms. He poses a very interesting question: "Is everybody out of step but this Court?" He continued that he thought that where speech is outside constitutional immunity, the local community or the state is left a large measure of discretion as to the means for dealing with it.

Let us examine the case of the eleven Communists.[25] These eleven petitioners were convicted for violation of the provisions of the Smith Act directed at conspiracy to teach or advocate the overthrow of the Government by force or violence. The trial of this case extended over nine months, six of which were devoted to the taking of evidence, resulting in a record of 16,000 pages. The grant of a writ of certiorari was limited to two questions:

> (1) Whether either section 2 or section 3 of the Smith Act inherently or as construed and applied in the instant case violated the First Amendment and other provisions of the Bill of Rights; and
> (2) Whether either section 2 or section 3 of the Act, inherently

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[23]Thomas v. Collins, 323 U.S. 516, 529-30 (1945).

[24]See Kunz v. New York, 340 U.S. 290, 302 (1951) (dissenting opinion).

[25]Dennis v. United States, 341 U.S. 494 (1951).

or as construed and applied in the instant case violated the first and fifth amendments because of indefiniteness.

The Supreme Court found:

> By virtue of their control over the political apparatus of the Communist Political Association, petitioners were able to transform that organization into the Communist Party; that the policies of the Association were changed from peaceful cooperation with the United States and its economic and political structure to a policy which had existed before the United States and the Soviet Union were fighting a common enemy, namely, a policy which worked for the overthrow of the Government by force and violence; that the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party; that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence.[26]

Our Court commented as to the legislative purpose in this legislation as follows:

> The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism . . . . No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence. The question with which we are concerned here is not whether or not Congress has such *power* but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution.

The Court then went on to discuss the meaning of clear and present danger and pointed out that the words cannot mean that before the Government may act, it must wait until the Putsch is about to be executed, the plans have been laid, and the signal is awaited. It stated further that if the Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel that circumstances permit, action by the Government is *required.* The argument that there is no need for the Government to concern itself—for the Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease—needs no answer. But that is not

[26] *Id.* at 498.

the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent.

One of the judges commented that the mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is no answer to the fact that there was a group that was ready to make the attempt.

> The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convinced the Court that their convictions were justified on this score.

The Court concludes that when facts are found that establish the violation of a statute, the protection against conviction afforded by the first amendment is a matter of law. The Court then held that as a matter of law there was a clear and present danger with which the Congress had a right to deal and which justified the convictions. Justice Frankfurter justified his concurring opinion on the right of a government to maintain its existence—self-preservation.

More recent cases add some confusion:

In *Yates v. United States*,[27] there was an indictment charging the defendants with conspiring, in violation of the Smith Act, (1) to advocate and teach the forcible overthrow of the government of the United States, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach.

The lower court had convicted, and the court of appeals had affirmed. The district court rejected instructions proposed by both sides which would have required the jury to find that the proscribed advocacy was not of a mere abstract doctrine of forcible overthrow, but of action to that end. The court of appeals, while recognizing that the proscribed advocacy must be associated in some way with action, considered the rejected instructions unnecessary because establishment of the conspiracy required proof of an overt act, this requirement being an adequate substitute for the linking of the advocacy to action. In reversing, the Court, speaking through Justice Harlan, held that the proposed instructions should have been given. In a special concurring opinion, Justice Black observed: "I believe that the First Amendment

[27] 354 U.S. 298 (1957).

forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal."[28]

In *Barenblatt v. United States*,[29] the defendant, a teacher, was called as a witness before a sub-committee of the House Committee on Un-American Activities which was investigating Communist infiltration into the field of education. Upon his refusal to answer questions as to his membership in and affiliation with the Communist Party, he was convicted in the United States District Court for contempt of Congress. On certiorari, the United States Supreme Court affirmed, holding in a five-four decision that the questions the defendant refused to answer did not infringe rights protected by the first amendment. Justice Harlan commented:

> That Congress had wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable . . . . In the last analysis this power rests on the right of self-preservation, "the ultimate value of any society" . . . . Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress.
>
> On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character . . . . [T]his Court has recognized the close nexus between the Communist Party and violent overthrow of government . . . . To suggest that because the Communist Party may also sponsor peaceable political reforms . . . is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II . . . .[30]

The rule of *Barenblatt* was followed in 1961 in *Wilkinson v. United States*[31] and *Braden v. United States*.[32] Both of these cases were also contempt of Congress prosecutions for refusal to answer questions as to membership in the Communist Party.

The registration requirements of the Smith Act were brought into limited focus in *Communist Party of the United States v. Subversive Activities Control Board*.[33] Section 7 of the Smith Act requires the

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[28] *Id.* at 340 (dissenting in part).
[29] 360 U.S. 109 (1959).
[30] *Id.* at 127-29.
[31] 365 U.S. 399 (1961).
[32] 365 U.S. 431 (1961).
[33] 367 U.S. 1 (1961).

registration with the Attorney General of all Communist-action organizations. First Amendment rights were raised, but overruled when the Court pointed out that the Act is a regulatory, not a prohibitory statute. The opinion (which covers 164 printed pages in L.Ed.) contains an excellent short history of The World Communist Movement and its activity in these United States. The Court stated that the Act applied only to *foreign dominated* organizations which work primarily to advance the objectives of a world movement controlled by the government of a foreign country.

A provision of the Subversive Activities Control Act of 1950 is well worth quoting:

> . . . . The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a *clear and present danger* to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each state a republican form of government, enact appropriate legislation recognizing the existence of such worldwide conspiracy and designed to prevent it from accomplishing its purpose in the United States.[34] (Emphasis added.)

A case of particular interest here is *Scales v. the United States*,[35] which originated in North Carolina. In that case Scales was convicted under the membership clause of the Smith Act. This clause made a felony the acquisition or holding of knowing membership in any organization which advocates the overthrow of the Government of the United States by force or violence. Holding that this statute does not infringe the first amendment freedoms, the Court stated that it was settled in the *Dennis* case that the advocacy with which the Court is here concerned is not constitutionally a protected speech, and that it was further established that a combination to promote such advocacy is not such association as is protected by the first amendment. It was held that the Act did not make all association with an organization which has been shown to engage in illegal advocacy a crime but that there must be *clear proof* that the defendant specifically intended to accomplish the aims of the organization by resorting to *violence*. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute. The Court then went on to consider the evidence which had

[34]Subversive Activities Control Act of 1950, 64 Stat. 987 (1950), 50 U.S.C. § 781(15) (1958).

[35]367 U.S. 203 (1961).

been introduced in the trial of the case in chief. It is beyond the realm of reasonable comprehension how anyone, having considered the evidence as outlined in this report, could take any position other than that this defendant was unquestionably guilty of a crime of actively engaging in an organization which had the overthrow of the government as its ultimate aim and which presented programs of accomplishing these ends in the immediate future.

First, the testimony showed an introduction of evidence of the teaching of Marxism, Leninism and the connected use of Marxist classics as textbooks; the official general resolutions and pronouncements of the Party at past conventions; dissemination of the Party general literature, including the standard outlines on Marxism; the Party's history and organizational structure; the secrecy of meetings and the clandestine nature of the Party generally; statements by officials evidencing sympathy for and alliance with the U. S. S. R.

In addition, the testimony brought out meetings wherein a small group of members were not only taught that violent revolution was inevitable, but they were also taught techniques for achieving that end. Members were directed to be prepared to convert a general strike into a revolution and to deal with Negroes so as to prepare them specifically for revolution. The illegal advocacy included: (1) the teaching of forceful overthrow, accompanied by directions as to the type of illegal action which must be taken when the time for the revolution is reached; and (2) the teaching of forceful overthrow, accompanied by a contemporary, though legal, course of conduct clearly undertaken for the specific purpose of rendering effective the latter illegal activity which is advocated. Furthermore, testimony was elicited that instructions included a statement "that the United States was objectively at the stage for Proletarian Revolution," that the time for the Proletarian Revolution would come when the objective conditions of political or economic crisis coincided with the "subjective condition" of a Communist Party which was large enough, with enough "influence" among the working classes, "to give the necessary leadership to lead the seizure of power." The testimony continued as to instructions in jujitsu, with an explanation as to how to kill a person with a pencil. All of this evidence came from the lips of witnesses and included the testimony of a Mr. Ralph C. Clontz, Jr., who, at the time of obtaining this information, was a student at Duke Law School.

Subsequently, the Court held in the case of *Noto v. United States*[36] that the evidence there elicited from witnesses was not sufficient to show that the Communist Party, of which defendant was a member, engaged in the advocacy, not of a mere abstract doctrine of forcible

[36]367 U.S. 290 (1961).

overthrow, but of action to that end. Noto was released from the charge making it a felony to acquire or hold knowing membership in an organization advocating the overthrow of the government by force or violence.

It seems clear to me that the members of the Communist Party, USA, have but a single objective in mind—the take-over of this country by whatever means might be available, be they legal or illegal. It is my personal feeling that it is time that we looked through their efforts at hiding behind the Constitution of the United States toward their true motives and purposes. We must protect the rights of the individual citizens of our country against infringement of their constitutional rights, but we must be conscious of the dangers involved, and be realistic in appraising the results of a "tolerant," "head-in-the-sand" attitude. These people (Communist Party, USA) are the enemies of all citizens of the United States. This should be recognized and appropriate restraints imposed.

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Student Comments

DUTIES IN CLOSING THE ESTATE AND THE LIABILITIES FOR THE BREACH THEREOF

I. Introduction

This comment, limited as it is to an examination of the fundamental steps in closing a decedent's estate, is an attempt to provide a guideline for young lawyers just beginning practice, as well as a means by which the older lawyers may review their check list of procedures to ensure that some small detail has not been overlooked. Certain areas will also be discussed which cover probate work in general:

(1) duties of the personal representative in closing the estate;
(2) effect of the breach of those duties;
(3) rights of the surety on the personal representative's bond against the principal;
(4) liability of the attorney for the estate for negligence.

II. Shepherd v. Townsend

Some of the problems which exist in closing an estate have been recently illustrated by the case of *Shepherd v. Townsend*,[1] which presents the problem of an executrix who negligently failed to locate "unknown heirs" of the testatrix, with resultant liability to such heirs because she did not protect herself by at least making publication for unknown heirs as provided by the Code.[2]

Mrs. Ammie Barnes Thomas, an 86 year old widow and resident of Leake County, died testate on October 13, 1958. The will gave her personal estate to her nearest of kin according to the laws of descent and distribution, the "nearest of kin" not being named in the will. On May 15, 1959, the executrix, after reducing the personal assets to cash, filed her final account. The next of kin were named as Robert S. Castle and Mrs. J. B. Garner, residents of Tate County, and Mrs. W. M. Garner, a resident of DeSoto County, as first cousins of the decedent. These cousins waived process and made oath that they were the decedent's nearest of kin. No process by publication was had for unknown heirs since it was assumed the nearest of kin had been determined. Final decree was entered ordering distribution of one-third of the net personal estate to each of the three first cousins, amounting to $9551.38 each.

More than two years later, on March 21, 1962, the complainant, William Garland Shepherd, filed suit against the cousins, the executrix,

[1]162 So. 2d 878 (Miss. 1964), *sugg. of error overruled*, 163 So. 2d 746 (1964).
[2]Miss. Code Ann. §§ 1270-72 (1956).

and the surety on her bond. As one of the cousins died before this suit was filed, his sole heir was made a defendant, but the suit was dismissed as to said heir. The complaint charged that Shepherd was an uncle of the half-blood and as such was the nearest of kin according to the laws of descent and distribution; that the first cousins fraudulently concealed the fact of complainant's existence from the court; that the negligence and lack of diligence on the part of the executrix resulted in failure to locate complainant as decedent's nearest of kin; that complainant was a necessary party to the final account and other administration proceedings; and that all proceedings in connection with the distribution of the estate were void.

The chancellor found that the complainant was the nearest of kin and that the decree approving the final account and ordering distribution of the estate was not res judicata as to him. Judgment was rendered against the two remaining cousins for the amounts they received, but the court found no lack of diligence on the part of the executrix or her attorney and dismissed the bill as to the executrix and her surety. From such dismissal, complainant appealed. The supreme court reversed and rendered a decree finding the executrix negligent in ascertaining the heirs of Mrs. Thomas. Judgment was entered against the executrix, individually, and the surety on her bond for the sum wrongfully distributed plus interest from the date of distribution. The liability of the surety was limited to $35,000, the amount of the bond.

The negligence occurred in the method used by the executrix, in conjunction with her attorney, in ascertaining the heirs. The decedent left surviving her no husband, child, descendants of children, brother, sister, or grandparent, and her heirs under the laws of descent and distribution would be uncles and aunts, if any; otherwise the next of kin would be determined as computed by the rules of civil law.[3] The decedent was the daughter of Aletha Shepherd Barnes and John W. Barnes. In ascertaining the heirs the executrix's attorney made sufficient inquiry into the Barnes side of the family, but the case turns on the failure of the executrix and her attorney as to the Shepherd side of the family. The only information concerning the Shepherd side came from the oaths of the three cousins, who stated they were the nearest of kin. No inquiry was made to check the validity of these statements, nor was any independent inquiry as to the Shepherd family made in the public records of Leake County. Had such been made, transactions would have been revealed involving the Shepherd family which when properly traced would have disclosed the existence of the complainant.

The court stated that the only way to determine whether the three cousins were the nearest of kin of the decedent "would have been to ascend the family tree to the common ancestor of decedent and said

[3]MISS. CODE ANN. § 468 (1956).

cousins, then descend the family tree to determine what descendants of the common ancestor survived the decedent." The court further states that had this procedure been pursued with reasonable diligence the identity of complainant's father would have been established, his will found, and complainant's existence and identity revealed.

III. Duties of the Personal Representative in Closing the Estate

The *Shepherd* case serves as an excellent illustration of the steps involved in closing the estate and the hazards with which the attorney, as well as the fiduciary, must contend. To say where the closing of an estate begins is somewhat arbitrary. This discussion will begin with the filing of the annual account since in certain cases the court or chancellor, on cause shown, may dispense with the filing of the final account.[4] The annual account[5] must be filed at least once a year or more often if so required by the court. The personal representative, under oath, renders the account of his administration by distinctly showing each receipt of money, the amount, the date and the source of the receipt.[6] Each disbursement must be supported by legal voucher[7] filed with the clerk which should be on "not less paper than a one half (½) page of legal cap" containing the style and number of the cause and a voucher number for purposes of orderly filing.[8] It has been suggested that "receipts can be taken in many instances to cover many vouchers" in order to cut the client's costs, a consideration too often ignored in the practice of law.[9] Each disbursement should reflect the authority for the disbursement giving the date of the decree and where it can be found in the court's minutes.[10]

Should an executor or administrator fail to file his annual account or be otherwise derelict in his duties he can be cited for contempt or removed from office unless cause be shown for such failure and that it was not the result of negligence or contumacy.[11] Likewise the attorney can be cited for his failure to perform his duties.[12]

The final account is filed under oath after the collection of the assets and payment of the debts of the estate. The final account[13] shall contain the balances of the annual accounts and any amounts received and charges and disbursements made, supported by legal

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[4]Miss. Code Ann. § 638 (Supp. 1962).

[5]Miss. Code Ann. § 631 (Supp. 1962).

[6]*Ibid.*

[7]Miss. Code Ann. § 632 (Supp. 1962).

[8]*Ibid.*

[9]Neville, *Closing Estates,* in Probate Law and Practice 203, 207, 18th Miss. L. Inst. (1963).

[10]*Id.* at 205.

[11]Miss. Code Ann. § 634 (1956).

[12]Neville, *supra* note 9, at 206.

[13]Miss. Code Ann. § 638 (Supp. 1962).

vouchers, which were not included in any previous annual account. A statement of the kind and condition of all assets in the hands of the personal representative is also required. The petition for approval of the final account should also include the prayer for process on interested parties, allowance of executor's[14] and solicitor's fees,[15] authority to pay unpaid expenses and court costs, and authorization for distribution to legatees or distributees. A date for hearing in vacation should be requested with process made returnable to that date.[16]

Together with the petition for approval of final account and discharge of the executor or administrator, the personal representative must file under oath a written statement of the known heirs, or devisees and legatees of the estate specifying "which, if any, are under the age of twenty-one years, of unsound mind, or convict of a felony; the places of residence of each and their post-office address if they be non-residents; or, if the post-office address be unknown, the statement must aver that diligent inquiry has been made to learn the same without avail, and giving the names and places of residence of the guardians of all who have guardians, so far as known."[17]

A question arises from reading the above-quoted statute whether diligent inquiry is required to learn the names of the heirs or devisees and legatees or simply to learn the post office address of the known nonresident heirs or devisees and legatees. This question has been resolved by a statement in the *Shepherd* case as in other previous cases[18] that section 639 of the Code requires the executor or administrator to use reasonable diligence to ascertain the names of the heirs or devisees and legatees.[19] As will be remembered, the executrix in that case, when the final account was filed, issued no process on the three cousins because they waived process and in the waiver made oath that they were the nearest of kin of the decedent.[20] Nor did the executrix combine with the final account a proceeding under Code Sections 1270-72 which provide that should a person die wholly or partially intestate, any heir at law or anyone interested in the property as to which that person died intestate *may* petition the chancery court for a judicial determination of that person's heirs at law. The procedure calls for all heirs at law and next of kin who are not made parties complainant[21] to be

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[14]Miss. Code Ann. § 642 (1956).

[15]Miss. Code Ann. § 633 (1956).

[16]Darden, *Wills* p. 8, Committee on Seminar for Young Lawyers, Junior Bar Section of Mississippi State Bar (1963).

[17]Miss. Code Ann. § 639 (1956).

[18]*E.g.*, Paepcke-Leicht Lumber Co. v. Savage, 137 Miss. 11, 101 So. 709 (1924).

[19]Shepherd v. Townsend, 162 So. 2d 878, 881 (Miss. 1964).

[20]*Id.* at 879.

[21]Miss. Code Ann. § 1271 (1956).

cited to appear and answer the suit or petition. Summons by publication to "the heirs at law of . . . . . deceased" is also required to be published as are other publications to absent or unknown defendants. "Upon satisfactory evidence as to death of said person and as to the fact that the parties to said suit are his sole heirs at law, the court shall enter a decree that the persons so described be recognized as the heirs at law of such a decedent. . . ."[22]

Such a decree is binding and conclusive upon all persons cited to appear from the date of rendition of the decree and upon all persons after two years from the date of its rendition, except as to minors and persons of unsound mind who have the right to re-open the cause within one year after attaining majority or on being restored to sanity.[23] This decree cannot be collaterally attacked, except for fraud.[24] A careful reading of sections 1270-72 of the Code exposes no words requiring due diligence in ascertaining the heirs of a deceased although the statute does require satisfactory evidence that the parties to the "1270 petition" are the sole heirs at law of said deceased. It is recognized by this writer that the above-mentioned sections must be read in the light of the general statute on publication.[25] That statute requires due diligence in ascertaining whether a defendant is located in this state and requires that due diligence be used in trying to learn the post office address of said non-resident or resident who cannot be found within the state; there is no reference to unknown heirs. However, both the general statute on publication and section 1855 of the Code, which provides for publication of summons to unknown heirs and unknown defendants, impliedly indicate the necessity for due diligence in ascertaining the unknown heirs before publication is made by requiring an affidavit to be filed. Even though the requirement of due diligence may be enforced by the necessity of "satisfactory evidence" that those persons cited under section 1271 are the sole heirs at law, the court in the *Shepherd* case makes the following statement:

> The executor could have proceeded to have the court determine the heirs as provided by Code Sec. 1270 et seq., and received the protection of a conclusive decree. She undertook to name the heirs in the final account and it *became* her duty to use reasonable diligence in ascertaining the names and places of residence of the heirs.[26] (Emphasis added.)

It must also be remembered that the supreme court goes on to find the executrix liable for negligence in ascertaining the heirs of the decedent.

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[22]*Ibid.*

[23]Miss. Code Ann. § 1272 (1956).

[24]*Ibid.*

[25]Miss. Code Ann. § 1852 (1958).

[26]Shepherd v. Townsend, 162 So. 2d 878, 881 (Miss. 1964).

With this in mind, the court seems to indicate that due diligence is not required if a proceeding under 1270 is followed and that duty does not arise until the executrix undertakes to name the heirs in the final account without making publication for the unknown heirs. This statement by the court implies that had the executrix made publication for unknown heirs, the decree would have been conclusive and the question of negligence of the executrix would not have been an issue or that it would have been immaterial in this case. Under the same set of facts as the *Shepherd* case, if the publication had been made under sections 1270-72, the complainant would have been barred from recovery of his rightful share of the estate from the executrix, and the issue of the executrix's negligence would never have been before the court. However, a legatee or distributee is liable for money or property paid to him by the personal representative under a mistake of fact, and this liability may be enforced by the fiduciary, or if he fails or refuses to act, it may be enforced by other beneficiaries.[27] Payment under a mistake of law cannot be recovered except for payment of debts of the estate.[28]

It is submitted that section 1271 of the Code should be amended to require due diligence as a condition precedent to this decree by the court. It has been noted above that the court may require "satisfactory evidence" to establish a person as the heir at law of a deceased, but the statements of the court in the *Shepherd* case make the effect of these words questionable. The chancellor in the cause below found the executrix was not negligent, and it is presumed he would have granted the decree under sections 1270-72 if requested to do so. Such decree would have resulted in a distribution of the Thomas estate to persons who were not entitled to receive it and about which the complainant could have done nothing. Evidently the term "satisfactory evidence" is not sufficiently definitive to insure reasonable diligence in determining heirship.

The statute[29] which requires names of parties in interest to be stated has been construed to mean that judgment creditors of the heirs of the intestate are not necessary, but proper parties. Even though they are interested parties and will be affected by the distribution of the estate, they do not have the power to unravel that which has already been done to a completion,[30] such as payment of claims of the estate.

When the final account is filed, summons must issue or publication be made for all parties in interest which are named in the sworn statement filed with the final account.[31] These persons are directed to appear

[27]See 346 C.J.S. *Executors and Administrators* § 505 (1942).

[28]*Ibid.*

[29]Miss. Code Ann. § 639 (1956).

[30]Stone v. Townsend, 190 Miss. 547, 1 So. 2d 237 (1941).

[31]Miss. Code Ann. § 640 (Supp. 1962).

at a term of court, or before the chancellor in vacation, not less than thirty (30) days from the service of summons or completion of publication to show cause why the final account should not be approved. Since the hearing is set for at least thirty days from the end of publication, it should be remembered to allow at least fifty-one days from the date of first publication to the date of the hearing to approve the final account.[32] It should also be noted here that in matters testamentary and of administration the chancellor can do all things in vacation that he could do in term time.[33]

The process required to be made in the procedure for final accounting can be waived[34] or appearance made in lieu thereof by any party defendant who is not an unmarried minor, lunatic, or convict of a felony without filing any pleading. Such waiver or entry has the same effect as if said person had been duly served with process, provided the waiver "be in writing dated and signed by the defendant and duly sworn to, or acknowledged, by him or her, or his or her signature thereto be proven by two (2) subscribing witnesses, before some officer authorized to administer oaths."[35] It must be noted that such waivers must be executed *after* the day the petition for accounting is filed, and the waiver is then filed with the papers in the cause and noted on the general docket. Quite often the lawyer prepares the account, has the executor or administrator sign it, and has the heirs sign a waiver before the account is actually filed. The validity of this practice is questionable.[36] In a case where heirs are being determined by the laws of descent and distribution, one should be very careful in having the heirs waive process unless the proceeding under section 1270 is invoked as can be seen by the *Shepherd* case.

Before the final account is allowed, all inheritance taxes imposed upon the executor which have become payable must have been paid.[37] Agreements may be made with the tax commissioner which shall be full satisfaction of the taxes to which the agreement relates for the purpose of facilitating the settlement and distribution of the estate.[38]

IV. Effect of the Breach of the Duties of the Personal Representative

Should the personal representative breach any of the duties of his office, he and the surety on his fiduciary bond become liable for that

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[32]Neville, *supra* note 9, at 208.

[33]Miss. Code Ann. § 1230 (1956).

[34]Miss. Code Ann. § 1872 (1956).

[35]*Ibid.*

[36]Neville, *supra* note 9, at 217.

[37]Miss. Code Ann. § 9262-22 (Supp. 1962).

[38]Miss. Code Ann. § 9262-22 (Supp. 1962); see Riegelhaupt v. Ostroffsky, 237 Miss. 521, 115 So. 2d 331 (1959).

breach under the conditions of the bond.[39] The purpose of the fiduciary bond which must be procured by the personal representative,[40] unless specifically waived in the will,[41] is to secure creditors and next of kin from loss through default or fraud of the personal representative and to furnish indemnity to the decedent's estate.[42] The obligation imposed by the surety bond rests in contract,[43] and the liability of the surety is within the terms of the contract and controlling statutes, coextensive with that of the principal.[44]

The condition of the surety bond is set forth by the statute[45] requiring the executor to "faithfully discharge all the duties required of him by law" in which case the obligation of the bond will be void. Generally, the Code enumerates certain actions of the personal representative which are breaches of the administrator's bond. Some examples of such breaches are: removal of any of the property of the estate out of this state;[46] the failure to pay a debt after its approval, when the estate has sufficient assets to pay same;[47] the failure to pay a creditor of an insolvent estate whose pro rata share has been adjudged and ordered paid from an insolvent estate;[48] the failure to file the annual report of the administration of the estate;[49] the right of an administrator de bonis non to sue the former executor or administrator where the estate is insolvent, or where it is necessary for the payment of the debts of the estate, or for any money due by the former personal representative which should have been accounted for and paid over by him.[50] An excellent example of the liability of the surety is found in the *Shepherd* case where the court required the surety to pay the complainant the amount wrongfully distributed, with interest from date of distribution, limited only to the amount of the bond ($35,000). The surety was liable for the negligence of the executrix in failing to exercise ordinary diligence in ascertaining heirs of the decedent with the result that the personal estate was distributed to the wrong persons, notwithstanding she made the distribution in good faith and in ignorance of

[39]See 34 C.J.S. *Executors and Administrators* § 944, (1942).

[40]Miss. Code Ann. §§ 514, 527 (1956).

[41]Miss. Code Ann. § 516 (1956).

[42]34 C.J.S. *Executors and Administrators* § 944 (1942).

[43]*Ibid.*

[44]New York Indem. Co. v. Myers, 161 Miss. 784, 138 So. 334 (1931).

[45]Miss. Code Ann. § 514 (1956).

[46]Miss. Code Ann. § 621 (1956).

[47]Dobbins v. Halfacre, 52 Miss. 561 (1876).

[48]Miss. Code Ann. § 628 (1956).

[49]Fidelity & Deposit Co. v. Doughtry, 181 Miss. 586, 601, 179 So. 846, 851 (1938); Miss. Code Ann. § 631 (Supp. 1962).

[50]Miss. Code Ann. § 529 (1956).

the existence of the person omitted, and that she relied on advice of counsel in so doing.[51]

V. Rights of the Surety on the Personal Representative's Bond Against the Principal

There seems to be very little reported case law in this state involving action by a surety against the personal representative to recover money paid in satisfaction of the claim resulting from the personal representative's breach of duty toward a creditor or a beneficiary. However, it has been held that when the surety of an administrator pays a debt of the intestate which the administrator had become bound to pay, the surety is entitled to the same lien on the estate that the payment would have given the administrator had it been made by him.[52] This case is an example of one of the two rights the surety has against the personal representative for a breach of the executor's or administrator's bond in absence of a statute conferring such right. Those rights are the surety's equitable right of subrogation[53] and the legal right of reimbursement.[54]

The right of subrogation is not founded on contract but upon justice and equity and rests upon the principle that substantial justice should be attained regardless of form; it is the mode by which the person who is the ultimate debtor is compelled by equity to pay the debt.[55] This "rule applies to contracts of fidelity or guaranty insurance and indemnity contracts. . . ."[56] Subrogation is equitable assignment[57] and upon the payment of the obligation by the surety, all the rights of the person receiving payment vest immediately in the surety,[58] and the surety, in effect becomes the creditor of the principal.[59]

The general rule regarding subrogation has been stated as follows:

> As a general rule, where a person interested in the administration of an estate as heir, devisee, legatee, or surviving spouse pays, in order to protect his interest or benefit the

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[51]Shepherd v. Townsend, 162 So. 2d 878 (Miss. 1964); 34 C.J.S. *Executors and Administrators* § 502 (1942); see generally Comment, *Reliance on Advice of Counsel*, 70 Yale L.J. 978 (1961).

[52]Gowing v. Bland, 3 Miss. (2 How.) 813 (1838); see generally Miss. Code Ann. §§ 253-59 (1956).

[53]Simpson, Suretyship 205 (1950).

[54]*Id.* at 224.

[55]Kellner v. Kellner, 241 Miss. 53, 62, 129 So. 2d 391, 395 (1961); Oxford Prod. Credit Ass'n. v. Bank of Oxford, 196 Miss. 50, 67, 16 So. 2d 384, 388 (1944).

[56]Oxford Prod. Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 67, 16 So. 2d 384, 388 (1944).

[57]Simpson, Suretyship 205 (1950).

[58]Oxford Prod. Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 68, 16 So. 2d 384, 389 (1944).

[59]Scott v. Nat'l City Bank, 107 Fla. 810, 139 So. 367, 370 (1931).

> estate, or has his interest taken for, or applied to the satisfaction of, a debt or claim against the estate for which the general estate, or the interests of others, are primarily liable either in whole or in part, he will be subrogated to the rights of the creditor whose debt is thus paid, to the extent that may be necessary to reimburse him for the amount for which he or his interest in the estate is not primarily responsible . . . .[60]

This principle can certainly be applied to the payment by the surety of the obligation of the personal representative in his official capacity to a creditor, a beneficiary, or even to an unknown heir, who later is successful in claiming a share of the estate, where the personal representative has breached the duties of his office. It must also be pointed out here that the measure of care in the management and closing of an estate is that which an ordinarily prudent man would exercise under like circumstances in the management of his own affairs.[61] The condition of the personal representative's bond is not that the personal representative will pay the debts of the estate in full, but that he will faithfully and diligently administer the affairs of the estate and pay the debts in so far as the assets of the estate will permit.[62]

The surety is not liable for anything until the principal is first liable, and if the surety is required to pay any part of the judgment, then the individual defendant would be obligated to reimburse the surety for that amount.[63] It has been held ". . . that an administrator or executor or active trustee in an express trust who personally pays the incontestible debts against the trust estate may be subrogated so as to stand in the rights of the creditors whose debts or securities were thus paid . . . ."[64] This result is reached on the theory that ". . . he has acted toward the ends which his official duties require ultimately to be accomplished through his management . . ." and by so advancing the interests of the estate his rights will not be adversely affected.[65] The fact that the surety is compensated by the principal for entering into the contract as security for him has never been considered a reason for denying the right of subrogation.[66]

The second of the rights of the surety against the principal is that of reimbursement. Although this right is equitable in origin,[67] the

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[60]83 C.J.S. *Subrogation* § 15 (1953).

[61]New York Indem. Co. v. Myers, 161 Miss. 784, 793, 138 So. 334, 336 (1931).

[62]*Id.* at 794, 138 So. at 336.

[63]Vanderslice v. Shoemake, 233 Miss. 523, 527, 102 So. 2d 804, 805-06 (1958); MISS. CODE ANN. §§ 255, 257 (1956).

[64]Love v. Robinson, 161 Miss. 585, 591-92, 137 So. 499, 500 (1931).

[65]*Id.* at 592, 137 So. at 500. *But see* Slaton v. Alcorn, 51 Miss. 72 (1875).

[66]*E.g.*, Maryland Cas. Co. v. McConnell, 148 Tenn. 656, 257 S.W. 410, 412 (1924); SIMPSON, SURETYSHIP 206 (1950).

[67]RESTATEMENT, SECURITY § 104, comment *f* (1941).

surety can today obtain reimbursement by an action at law[68] on the theory of contract between the principal and surety, either implied from the circumstances[69] or from an express contract such as the executor's bond.[70] The right of reimbursement arises when the surety becomes bound,[71] and it accrues as a cause of action when the creditor has been paid.[72] The surety could then proceed against the personal representative in an action at law as well as in equity.

By way of summary, we may say that even though the executor or administrator has a bond which pays the creditor, or beneficiary, or later-discovered heir, it appears that the executor will be liable to the surety for the amount paid to said creditor, beneficiary, or heir. The executor is then ultimately liable for his negligence or wrong-doing.

VI. Liability of the Attorney for the Estate for Negligence

It is safe to assume that most executors or administrators who are not attorneys are incapable of properly closing out the estate, and for such reason the attorney must be employed in order to meet the standard of care required by the fiduciary relationship. Where an executor is found negligent, what is the position of the attorney in this ultimate liability?

Finding the attorney liable for negligence is not unique.[73] The legal profession was among the first "callings" to be held liable on that basis—as early as the middle of the eighteenth century.[74] Although the attorney owes a common law duty in respect of his employment as does an agent,[75] he is usually held to an even higher degree of responsibility than that required of other fiduciaries.[76] The early cases in this field held the attorney liable only for gross negligence or lack of skill in the conduct of litigation,[77] but the great weight of authority today[78] imposes

[68]Woodward v. May, 5 Miss. (4 How.) 389 (1840); Miss. Code Ann. § 8677 (1956); Currie, *Impairment of the Right to Subrogation as a Suretyship Defense in Mississippi*, 27 Miss. L.J. 1 (1955).

[69]Searcy v. Shows, 204 Ala. 218, 85 So. 444, 446 (1920); Restatement, Security § 104, comment *f* (1941).

[70]34 C.J.S. *Executors and Administrators* § 944 (1942).

[71]*E.g.*, Pennington v. Seal, 49 Miss. 518, 525 (1873).

[72]Magee v. Leggett, 48 Miss. 139, 144 (1873); Currie, *supra* note 68.

[73]Blaustein, *Liability of Attorney to Client in New York for Negligence*, 19 Brooklyn L. Rev. 233 (1953); Isaacs, *Liability of the Lawyer for Bad Advice*, 24 Calif. L. Rev. 39 (1935); Wade, *The Attorney's Liability for Negligence*, 12 Vand. L. Rev. 755 (1959).

[74]Wade, *supra* note 73, at 755.

[75]Higgins Lumber Co. v. Rosamond, 217 Miss. 1, 63 So. 2d 408 (1953); 2 Mechem, Agency § 2150 (2d ed. 1914).

[76]*E.g.*, 536 Broad St. Corp. v. Valco Mortgage Co., 135 N.J. Eq. 361, 38 A.2d 903, 911 (1944).

[77]*E.g.*, Fitch v. Scott, 4 Miss. (3 How.) 314 (1839).

[78]Finkel, *Liability of An Attorney in the Conduct of Litigation*, 12 Syracuse L. Rev. 494 (1961).

liability on the attorney for damages resulting from his failure to exercise ordinary care, skill, and diligence.[79] There has been universal agreement that a lawyer is not an insuror or guarantor of the correctness of his work or of the results which will be attained,[80] unless he makes a contract warranting a particular result.[81] Such warranty must be expressed because none is implied from the relationship of attorney and client.[82]

In discussing the relation of attorney and client, our court has said, quoting 25 C.J. 1120:

> 'When a fiduciary relation is established between parties, courts of equity scrutinize very closely any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence. All transactions between parties in this relation are presumptively fraudulent and void.' And these principles apply to probate proceedings involving the administration of estates . . . .[83]

To find the attorney liable for negligence, there must first exist the relationship of attorney and client.[84] The relationship is not dependent on the payment of a retainer,[85] although a retainer is the usual evidence of such a relation. Potential liability also exists where he acts gratuitously.[86] Some of the more common areas of attorney negligence are: failure to follow client's instructions;[87] compromise of a debt for less than full amount or settling for something other than money without client's consent;[88] unauthorized appearance by attorney;[89] failure to prepare and file all pleadings necessary and take other required steps in the litigation;[90] and negligence in title search.[91]

In the area of the administration of estates, the attorney has been found negligent where he delayed the preparation and filing of the accounts and had made omissions and other errors therein.[92] In another

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[79]*E.g.*, Hodges v. Carter, 239 N.C. 517, 80 S.E. 2d 144 (1954).

[80]*E.g.*, *In re* Woods, 158 Tenn. 383, 13 S.W.2d 800 (1929); Wade, *supra* note 73, at 760.

[81]See, *e.g.*, Hudson v. Kimbrough, 74 Miss. 341, 20 So. 885 (1896).

[82]*E.g.*, Sullivan v. Stout, 120 N.J.L. 304, 199 Atl. 1 (1938).

[83]Gwin v. Fountain, 159 Miss. 619, 645, 126 So. 18, 22 (1930).

[84]*E.g.*, Kendall v. Rogers, 181 Md. 606, 31 A.2d 312 (1943).

[85]Pyeatt v. Estus, 72 Okla. 160, 179 Pac. 42 (1919).

[86]Glenn v. Haynes, 192 Va. 574, 66 S.E.2d 509, 512 (1951); see Blaustein, *supra* note 73, at 241-43.

[87]Rumage v. Cohn, 124 Pa. Super. 525, 189 Atl. 496 (1937).

[88]Coopwood v. Baldwin, 25 Miss. 129 (1852).

[89]Schirling v. Scites, 41 Miss. 644 (1868).

[90]Roehl v. Ralph, 84 S.W.2d 405 (Mo. Ct. App. 1935); see Grayson v. Wilkinson, 13 Miss. (5 S.&M.) 268 (1845).

[91]Gleason v. Title Guarantee Co., 300 F.2d 813 (5th Cir. 1962).

[92]Thompson v. Lobdell, 18 La. 195 (1844); Flynn v. Judge, 149 App. Div. 278, 133 N.Y. Supp. 794 (1912).

case, although there was no damage, the attorney was suspended for three months for gross negligence where he commingled monies of two estates with his own personal account and allowed his bank account to fall below the amount necessary to close the estates during that time.[93] The negligent failure to close an estate for twenty years, although no damage was caused to the estate, resulted in an attorney's suspension for six months.[94] Attorneys have been held liable in damages to the client for failure to procure proper service of process, the court stating that "whether the attorney's neglect in this respect is due to his ignorance, incompetency, or inattention is immaterial to the question of his liability."[95] Other cases find negligence in the failure to protect a client's claim by not complying with the notice requirements[96] and the failure to persist in attempting service of process.[97] However, the attorney is generally not liable for errors of judgment in the conduct of a lawsuit.[98]

The failure of the attorney to exercise the required standard of care is not actionable unless his negligence was the proximate cause of the client's resulting damages,[99] which are similar to damages in other negligence cases.[100] An attorney for an administratrix was held liable to the surety for the amount the surety was forced to pay as a result of the attorney's conduct which caused the surety to incur liability which it would not have incurred but for the abuse of the confidence reposed in him as an attorney at law and officer of the court.[101] The question of whether the standard of care of the attorney has been breached is held to be a question of fact for the jury.[102]

The liability of an attorney for negligence to third parties is often discussed regarding the theory of privity of contract. Since we are mainly concerned with the relationship of attorney and personal representative, this question will not be fully discussed. It will be pointed out, however, that the old rule that the liability of an attorney for negligence or ignorance is solely to his client[103] has been rejected in

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93*In re* Melin, 410 Ill. 332, 102 N.E.2d 119 (1951).

94*In re* Miller, 55 Nev. 444, 38 P.2d 972 (1934).

95Wilson v. Carroll, 80 Colo. 234, 250 Pac. 555, 557 (1926).

96McLellan v. Fuller, 226 Mass. 374, 115 N.E. 481 (1917).

97Dearborn v. Dearborn, 15 Mass. 316 (1818).

98Blaustein, *supra* note 73, at 244-45.

99See generally Annot., 45 A.L.R.2d 5, 19 (1956).

100Wade, *supra* note 73, at 771.

101United States Fid. & Guar. Co. v. Roberson, 142 So. 321 (La. Ct. App. 1932).

102Wade, *supra* note 73, at 766.

103*E.g.*, Savings Bank v. Ward, 100 U.S. 195, 200 (1880).

104Lucas v. Hamm, 56 Cal. App. 2d 583, 364 P.2d 685 (1961), *cert. denied*, 368 U.S. 987 (1962); Biakanja v. Irving, 49 Cal. App. 2d 647, 320 P.2d 16 (1958).

two recent cases.[104] The California court stated in *Lucas v. Hamm*[105] that lack of privity between the beneficiary of a will and the attorney who drafted it did not preclude the beneficiary from maintaining an action in tort against the attorney. The beneficiary did not recover, but for other reasons.

There appears to be little doubt that an attorney employed by the personal representative of an estate can be liable for damages for his negligent conduct. This is a close question of policy in the legal profession which of necessity must be somewhat free to use the individual's ingenuity, yet the attorney who injures his client from professional negligence also damages the remainder of the bar in the eyes of the public and should be dealt with accordingly.

VII. Conclusion

At first blush, the *Shepherd* case may seem to go too far in the requirements set forth in determining heirship: that of ascending the family tree to the common ancestor of the decedent and the persons claiming to be the nearest of kin, then descending the family tree to locate the nearest of kin; requiring a search of the public records of the county wherein the decedent died to find a divorce proceeding of decedent's grandfather together with other information showing he had moved to Tate County; and the search of the Tate County records which would have revealed the will of decedent's grandfather naming the complainant who was the child of the grandfather and his second wife. However, this requirement of search is no greater than that required before one would certify title to property.

The attorney, as well as the personal representative, is in a position which calls for the highest degree of care in the administration and closing of the estate. All concerned are dependent on his skill and good judgment. Should his failure to adhere to the requirements of diligence and care in his professional endeavors cause damage to an individual, he may be subjected to an action to recover for those damages. This comment is not intended to stir a wave of litigation in this field, but simply to point out to the reader that the license to practice law does not render one immune from liability.

H. Wingfield Glover, Jr.

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[105]56 Cal. App. 2d 583, 364 P.2d 685 (1961), *cert. denied*, 368 U.S. 987 (1962).

HOMESTEAD EXEMPTION LAW IN MISSISSIPPI AS IT AFFECTS THE CLAIMS OF CREDITORS

I. Introduction

The term homestead exemption, as used in Mississippi, refers to three distinct but closely related areas of law. These areas are exemption of a homestead from the claims of creditors,[1] the requirement that both spouses must join in a conveyance of a homestead,[2] and the exemption of a homestead from certain ad valorem taxes.[3] It shall be the purpose of this paper to examine only that area of the law that exempts homesteads from the claims of creditors.

A. Purpose of Homestead Exemption Law

Homestead exemption laws are founded on considerations of public policy. Their purpose is to promote the stability and welfare of the state by perpetuating the ownership of property and of maintaining a home where the family may live without fear of its loss because of economic failure of the head of the household. The law is not based on principles of equity, because its purpose is to secure a home for the family, regardless of the financial condition of the householder, even at the sacrifice of the rightful demands of a creditor. It seeks to cut off the obligations of creditors imposed against the head of a family that would deprive the dependent members of the family of a home. Since the paramount importance of a homestead exemption law is the preservation of the home,[4] it has been a guiding principle of the court to interpret the law liberally.[5]

II. Necessary Elements for Homestead Exemption

A. Interest in Property

Homestead exemption may be claimed for property which has been occupied under the circumstances required by the statute.[6] The statute does not define the interest required for a person to claim homestead exemption, but only refers to "the land and building owned and occupied . . ." by the claimant. Therefore, the task of determining the estate or interest necessary has been left to the courts.

The rule developed by the courts is that the right to homestead exemption may be founded on the ownership of any assignable interest

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[1]Miss. Code Ann. §§ 317-29 (1956).

[2]Miss. Code Ann. §§ 330-33 (1956).

[3]Miss. Code Ann. §§ 9714-9743.5-11 (1956).

[4]26 Am. Jur. *Homestead* § 6 (1954).

[5]*E.g.*, Trotter v. Dobbs, 38 Miss. 198 (1859).

[6]Miss. Code Ann. § 317 (1956).

in property.[7] Therefore, the interest necessarily need not be ownership in fee.[8] A person holding an interest in land for life, for years, or any greater estate is entitled to homestead exemption if he is otherwise qualified.[9] The estate may be of the lowest nature, but it must be assignable to qualify.[10] A person who is a mere occupant or tenant-at-will on land does not have a sufficient interest to support a claim for homestead exemption.[11]

B. Citizenship

The right to homestead exemption is specifically limited by statute to citizens of this state.[12] Difficulty arises, however, when a person has established a residence in another state but still owns a home and property in this state. If he has not abandoned his homestead in this state and has not become a citizen of another state, he is entitled to homestead exemption.[13] Since citizenship is merely a status, it must result from the residence and intent of a person. It generally follows the residence. Therefore, if a person, who owns a home and property in this state, ceases to do business here and establishes a residence in another state and engages in business there, a presumption will arise that he is a citizen of the state to which he has moved.[14] Actual residence in another state, coupled with business activity of a permanent nature there, will evidence an intent to become a citizen of that state and will disqualify a person from claiming homestead exemption in this state.[15]

C. Householder and Family

It is specifically provided by statute that a person must have a family and be a householder before he can claim homestead exemption.[16] Homestead exemption is a privilege rather than an estate that exists for the benefit of the family. The exemption is allowed to enable the owner of the home to meet and discharge the obligation of supporting his family.[17] Therefore, with but one exception, there is no logical

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[7]Davis v. Davidor, 200 Miss. 657, 655, 27 So. 2d 371, 373 (1940); Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1937); Stuart v. Kennedy & Co., 145 Miss. 738, 110 So. 847 (1926); Berry v. Dobson, 68 Miss. 483, 10 So. 45 (1891).

[8]Clark v. Edwards, 180 Miss. 97, 177 So. 361 (1937); Tanner v. Tanner, 111 Miss. 460, 71 So. 749 (1916); King v. Sturges, 56 Miss. 606 (1879).

[9]Johnson v. Richardson, 33 Miss. 462 (1857).

[10]Berry v. Dobson, 68 Miss. 483, 10 So. 45 (1891).

[11]*Ibid.*

[12]Miss. Code Ann. § 317 (1956).

[13]See Meyer Bros. Drug Co. v. Fly, 105 Miss. 752, 63 So. 227 (1913).

[14]Meyer Bros. Drug Co. v. Fly, 105 Miss. 752, 63 So. 227 (1913).

[15]Bank of Hattiesburg v. Mollere, 118 Miss. 154, 79 So. 87 (1918).

[16]Miss. Code Ann. § 317 (1956).

[17]See Hill v. Franklin, 54 Miss. 632 (1877).

reason for allowing the exemption to a person who does not have a family.

This exception is that if the person claiming the exemption is over sixty years of age and has been an exemptionist prior to reaching that age, he may not be deprived of the right to claim homestead exemption because he does not have a family.[18] The reason for this exception is that when a person usually reaches the age of sixty he is at a phase of life where his ability to earn and accumulate begins to decline.[19] The prevention of this person from becoming a public ward is a desirable goal of the homestead exemption law.[20] The legislature, by granting this exception, did not enlarge or add to the class of persons who are entitled to the exemption, but only prescribed new conditions for the continuance of an exemption that already existed.[21]

A householder can generally be defined as a person who is the head of a family, owning or holding and occupying a house together with his family and living in one domestic establishment.[22] A householder or head of a family need not be a husband or father. Nor need the family over which he presides be kept together continuously as a unit. A temporary absence by some members of the family will not dissolve the family relationship or break up the household.

If a family is made up of a widower and his children, the widower may, as the head of the family, send his children away to attend school without forfeiting his right to homestead exemption, providing he continues to reside at the home.[23] If a widower moves to this state and establishes a residence, but keeps his children in school in another state, he has the right to claim homestead exemption.[24] The status of householder and head of a family is conferred upon the widower even though his children have never resided in the new home because their intention to do so as soon as school is out makes their absence only temporary.

Under the law of this state parents are obligated to maintain dependent members of their family who are unable to care for themselves.[25] In homestead exemption law, however, a legal obligation is not necessary to make one the head of a family. If there is a sufficient moral obligation to cause a person to support another in

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[18]Miss. Code Ann. § 317 (1956).

[19]McCreight v. W. W. Scales & Co., 134 Miss. 303, 314-15, 99 So. 257, 258 (1923).

[20]*Ibid.*

[21]*Id.* at 314.

[22]Pearson v. Miller, 71 Miss. 379, 14 So. 731 (1893).

[23]Roberts v. Thomas, 94 Miss. 219, 48 So. 408 (1908).

[24]*Ibid.*

[25]Miss. Code Ann. § 7357 (1956).

his home as a member of his family, that person may be considered the head of a family and entitled to homestead exemption.[26] Therefore, a widow who supports her children who are over the age of twenty-one, for which she is under no legal duty to do, so that they may go to college, may claim homestead exemption.[27] It may be a natural or moral duty for a particular parent to give his children the education he may think necessary and proper. The mere fact that the children are over the age of twenty-one does not destroy this natural or moral duty.

A person, who because of a moral duty supports an aged relative, but does not live in the same house with that relative, may not claim homestead exemption because he is not occupying a house and living in one domestic establishment with that relative.[28] It is just as obvious that a widower is not the head of a family, within the meaning of the homestead exemption law, because his adult son, who is able-bodied and capable of earning a living, lives with him.[29] There can be no moral or legal obligation to support a person who is an adult and capable of making a living. Similarly, a widower who moves in with his married son, who supports his own family, is not entitled to homestead exemption when he only contributes to his own support because his son supports his family, and the father is in no way a householder and the head of a family.[30]

D. Residence and Occupancy

Residence and occupancy of the homestead by the claimant is required before an exemption may be claimed.[31] The residence and occupancy required to establish a homestead cannot be constructive because the premises will not qualify as a homestead until there has been actual residence and occupancy of the home by the claimant and his family.[32] The general rule has been expertly discussed by the court as follows:

> One of the leading objects of these statutes is to create, preserve, and protect a home for the family, for the wife, mother and children, as well as for the husband and father. A characteristic feature of home is a place of residence, of which occupancy is an essential element. As a general rule, to constitute a homestead there must be actual occupation, and use of the premises as a house for the family. The premises must be

[26]See Holsomback v. Slaughter, 177 Miss. 553, 560-61, 171 So. 542, 543 (1936); Powers v. Sample, 72 Miss. 187, 190, 16 So. 293, 294, (1894).

[27]Holsomback v. Slaughter, 177 Miss. 553, 171 So. 542 (1936).

[28]Pearson v. Miller, 71 Miss. 379, 14 So. 731 (1893).

[29]Cox v. Martin, 75 Miss. 229, 242, 21 So. 611, 614 (1897).

[30]Powers v. Sample, 72 Miss. 187, 16 So. 293 (1894).

[31]Miss. Code Ann. § 317 (1956).

[32]Campbell v. Adair, 45 Miss. 170, 178 (1871).

> appropriated, dedicated or used for the purpose designated by the law, to wit: as a home, a place to abide and reside on, "a home for the family."[33]

Therefore, if the head of a family uses his property for the support of his family, but has never resided upon it, he may not claim it as a homestead.[34] It is not enough that the claimant has an intent to occupy the property, even though he has installed some of his household goods or fixtures upon it, because the placing of a few articles of personal property upon the premises, without actually occupying the property, does not meet the requirements of occupancy.[35]

The homestead statute does not require the claimant to utilize every acre of land in a tract before it can be claimed as a homestead.[36] The occupancy and use of the premises by a family is presumptive evidence of the appropriation of the statutory limit of property as a homestead. The property may be used only as a place of residence for the claimant and his family and still be a homestead. Therefore, if a tract of land is claimed as a homestead, it is not necessary for the claimant to prove that the whole tract is being devoted to a particular or profitable use or that it has not been used for a purpose other than a residence for his family.

E. Doctrine of Trotter v. Dobbs

The court in *Trotter v. Dobbs*,[37] and in subsequent cases,[38] declared that a landowner is entitled to claim his right to homestead exemption even though a judgment has been rendered against him and execution has been levied upon his property, if he qualifies before the land is sold. Since the purpose of the exemption is to allow a property owner to hold land for the support of himself and his family, the fact that the claimant qualifies for the exemption after a judgment has been rendered against him is immaterial because the purpose of the exemption exists just as much after the judgment as before.[39] The rights of a creditor are not impaired if the landowner was not qualified for homestead exemption before a judgment, but is afterwards, because even if a lien exists against the property of a claimant, the creditor's rights are limited by the statutory restriction that if he does not sell the property before the claimant qualifies for the exemption, it becomes exempt and cannot be sold. It is immaterial at what time after the judgment,

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[33]*Id.* at 177-78.

[34]Mounger v. Gandy, 110 Miss. 133, 69 So. 817 (1915).

[35]Chrismand v. Mauldin, 130 Miss. 259, 94 So. 1 (1922).

[36]Daily v. City of Gulfport, 212 Miss. 361, 54 So. 2d 485 (1951).

[37]38 Miss. 198 (1859).

[38]Dulion v. Harkness, 80 Miss. 8, 31 So. 416 (1902); Irwin v. Lewis, 50 Miss. 363 (1874); Lessley v. Phipps, 49 Miss. 790 (1874).

[39]Trotter v. Dobbs, 38 Miss. 198, 199 (1859).

but before the sale, the claimant qualifies for the exemption. A claimant may qualify for an exemption at *any* time before his interest in the property is sold to satisfy his creditor. Even if a landowner were to qualify for the exemption just a few hours before the sale of his property is scheduled, for example, by getting married, he still may claim the exemption.[40] The policy of the statute plainly is to give the claimant the use of his homestead property, exempt from levy and execution by his creditors, for the benefit and support of himself and his family. There is no time limit upon the operation or enjoyment of the homestead right.[41] The statute merely provides that the property shall be held exempt from "seizure or sale under execution or attachment."[42] If a judgment is to be satisfied by the sale of property that a person owns but does not reside upon, an exemption may be claimed for the property if the claimant moves on it and establishes a homestead before it is sold,[43] even if the claimant has made a fraudulent conveyance of property to avoid his creditors, and it has been set aside by a decree that provides for the sale of the property.[44] A fraudulent conveyance does not enlarge a creditor's rights but only leaves him in a position to enforce such rights as existed if no fraudulent conveyance had been made.

The doctrine of *Trotter v. Dobbs* has not gone without criticism. It has been referrred to as an erroneous, unsound, and mischievous doctrine.[45] The principle objection has been that after a judgment the property of a claimant should be bound by a lien to the creditors, and by allowing the claimant to establish an exempt homestead on the land before it is sold, he unbinds the property, defeats the lien, and renders any sale nugatory. This criticism, however, completely overlooks the wording of the statute, which says nothing about the property being bound by a lien from the time of the judgment. The statute refers only to a sale of the property. In any event, the question of unsoundness seems to have been laid to rest by the case of *Barnes v. Buchanan*[46] where the court said, "There was at one time some disposition to question the reasoning of the court in *Trotter v. Dobbs*, . . . but it is certain now that the rule announced in that case is the finally settled law of this state."[47]

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[40]*Ibid.*

[41]*Ibid.*

[42]Miss. Code Ann. § 317 (1956).

[43]Letchford v. Cary, 52 Miss. 791 (1876); Jones v. Hart, 62 Miss. 13 (1884).

[44]Barnes & Co. v. Buchanan, 108 Miss. 822, 67 So. 462 (1914); Dulion v. Harkness, 80 Miss. 8, 31 So. 416 (1902).

[45]Brantley v. Batson, 84 Miss. 411, 36 So. 524 (1904); Richie v. Duke, 70 Miss. 66, 12 So. 208 (1892).

[46]108 Miss. 822, 67 So. 462 (1914).

[47]*Id.* at 833, 67 So. at 464.

F. Separate Tracts of Land as a Homestead

Before 1892, noncontiguous tracts of land could not be included in an exempt homestead.[48] However, a statute enacted in 1892 provided that if a selection of the homestead had not been made or if there had been an improper selection by the claimant, the land authorized by statute to be selected as the homestead by the properly appointed commissioners should be in a compact form, made up of contiguous tracts, including the dwelling house, if practical, and in all cases where the homestead is selected from detached tracts, it should be made up of those nearest the tract containing the dwelling house.[49] This statute recognized the fact that noncontiguous tracts of land could be used to make up a homestead. The first case to construe the statute held that the allotted homestead need not necessarily be composed of contiguous tracts of land.[50] It is generally conceded, however, that the fact that land claimed as a homestead is noncontiguous is a factor to be considered against the claimant.[51] It is also well established that only rural noncontiguous tracts of land may constitute a homestead. Of course the fact that two tracts of land are separated by a railroad right-of-way or a road will not make them noncontiguous.[52] The general rule is, therefore, that a landowner may claim separate tracts of rural land as a homestead if the separate tracts are not put to a use inconsistent and independent of the home tract.[53]

In situations involving noncontiguous tracts of urban land the court has refused to allow the separate tracts to be included in a homestead.[54] The court has also held that noncontiguous tracts of urban and rural land may not be included in an exempt homestead.[55] The reason for not allowing an exemption for noncontiguous tracts of urban land is that an urban homestead, because of its nature, was intended by the legislature for only one purpose, a residence. Since separate tracts of urban property that do not contain the dwelling house cannot be used as a residence, any use made of such separate tracts will be inconsistent with the purposes and intent of the homestead exemption law. A different legislative intent is evidenced, however, in determining if separate tracts of rural land may qualify for homestead exemption, because a rural homestead was not intended to be used solely as a residence, but as a means of support for the family.

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[48]Hinds v. Morgan, 75 Miss. 509, 521, 23 So. 35, 38 (1897).

[49]Miss. Code Ann. § 322 (1956).

[50]Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895).

[51]Horton v. Horton, 210 Miss. 116, 125, 48 So. 2d 850, 852 (1950).

[52]Parisot v. Tucker, 65 Miss. 439, 4 So. 113 (1888); Acker v. Truland, 56 Miss. 30, 36 (1878).

[53]Horton v. Horton, 210 Miss. 116, 48 So. 2d 850 (1950).

[54]Meyers v. American Oil Co., 192 Miss. 180, 186, 5 So. 2d 218, 219 (1941).

[55]Ney v. Winborne, 120 Miss. 1, 81 So. 644 (1919).

Since separate tracts of rural property may be used in a farming operation to support the family, their use will not be inconsistent.[56]

The test to be applied to see if noncontiguous tracts of rural land may be included in an exempt homestead is whether or not the separate tract is being devoted to a use that is consistent with that of the tract containing the dwelling.[57] The mere fact that a landowner is receiving income from a separate tract of land should only be a factor to be considered and not controlling because it is obvious that a landowner could receive income from a separate tract of urban property. If a separate tract of rural land is part of one farming operation, and is used as if it were adjoining the tract on which the residence is located, it would be included as part of the exempt homestead. If, however, the separate tract is located at such an unreasonable distance from the residence as to prevent its reasonable and convenient use with the tract containing the residence, it cannot be included as part of the exempt homestead. It is obvious in determining if separate tracts of land may be included in the exempt homestead that each case must be governed by its own particular facts.

In connection with the problem of rural and urban homesteads, the court has determined that a single tract of land that is part urban and part rural may be claimed in an exempt homestead as long as it does not exceed the statutory limits.[58] This situation commonly exists when land is located at the corporate limits of a city. This is a proper result because in many small towns in Mississippi the corporate limits often are located well beyond the actual urban areas.

G. Business Ventures and Homestead Exemption

Since homestead exemption was not intended to protect pure business ventures from creditors, the court has held that land used in a partnership cannot qualify for homestead exemption.[59] The court reasoned that partnership property would not qualify for the exemption because it is an asset of the partnership, liable for its debts and therefore considered as personalty between the partners and the creditors. If the partnership is dissolved, however, and the partners become tenants in common, the land formerly owned by the partnership may qualify for homestead exemption.

A different situation exists if an urban lot is used for both residential and business purposes. If a person has a small business on his lot with his residence, the entire lot, including the business, is exempt

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[56]Horton v. Horton, 210 Miss. 116, 48 So. 2d 850 (1950).

[57]*Id.* at 131, 48 So. 2d at 855.

[58]Fitzgerald v. Rees, 67 Miss. 473, 7 So. 341 (1889).

[59]Hamilton v. Halpin, 68 Miss. 99, 8 So. 739 (1890).

if its value does not exceed the statutory limit.[60] The court reasoned that since the legislature allowed a substantial quantity of land to be included in a rural homestead, it was an indication of an intent for the homestead to provide a means of support for the exemptionist and his family, and there was no reason for not allowing the same privilege to owners of a tract of rural property.

III. Selection of the Homestead

The general rule is that when a court renders a judgment against a debtor and the execution of the judgment is to be levied against the land of the debtor, he may claim all properly qualified land as an exempt homestead at any time before the sale.[61] The claimant is under no duty to set out before the sale his property that qualifies for the exemption from that which does not qualify.[62] If a claimant is properly qualified for homestead exemption, nothing more than asserting his claim before the sale is required of him to enforce his rights. No specific form is required to notify creditors that a debtor will insist on his homestead rights. The right to the exemption is dependent only upon the landowner being properly qualified for it.

A. Right of the Husband to Select the Homestead

Except in unusual cases, the husband is the head of the family, and as such, has the right to choose and establish the home.[63] This rule applies even though the wife is under none of the common law disabilities as to her separate property. If a person owns several tracts of land and moves upon one tract and sells the others, he undoubtedly evidences an intent to choose the property on which he resides at the time of the sale as his homestead.[64] If a person continues to own several tracts of land and resides upon one tract with his family, there can be no privilege of selection of a homestead because the law confines the right to the parcel upon which the claimant and his family reside.[65] Of course, if the claimant and his family were to move to one of the other tracts of land he owns, the right to claim homestead exemption for that tract would exist.

B. Selection of the Homestead by the Claimant

It is provided by statute that a citizen who is entitled to claim homestead exemption may select his homestead by making a declara-

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[60]Colbert v. Henley, 64 Miss. 374, 1 So. 631 (1886); Baldwin v. Tillery, 62 Miss. 378 (1884).

[61]*E.g.*, Trotter v. Dobbs, 38 Miss. 198 (1859).

[62]Lessley v. Phipps, 49 Miss. 790, 796 (1874).

[63]Patrick v. Bank of Tupelo, 169 Miss. 157, 152 So. 838 (1934).

[64]Tanner v. Tanner, 111 Miss. 460, 71 So. 749 (1916).

[65]Partee v. Stewart, 50 Miss. 717, 720 (1884).

tion which contains the county where the property is located, the name of the claimant, and a description of the property claimed as a homestead.[66] The declaration must be acknowledged or proved in the same manner as a deed and deposited in the chancery clerk's office for recordation in the homestead record book. While the filing of a declaration of homestead is not required by a landowner in order to assert his claim to homestead exemption, it is a convenient method of giving notice of the claimant's assertion of that right.[67] The right to select a homestead by declaration belongs solely to the owner of the property.[68]

C. Effect of a Declaration of Homestead

The filing of a declaration of homestead, as provided by statute, is notice to everyone and binds the claimant, his wife, and his creditors until he executes and files a new declaration.[69] The filing of a new declaration will nullify a preceding one and take its place. A declaration of homestead is subject to court action and allotment if the landowner has claimed too much land, exceeded the value allowed, or has improperly described the land. The creditors of a landowner who claims homestead exemption may also contest the declaration on the grounds that the claimant was not properly qualified for the exemption.

If the declaration is not made in good faith because the land or the claimant is not properly qualified, it will have no effect.[70] A judgment creditor may be entitled to sell a tract of land if the proof shows that the debtor or his wife is not entitled to claim it as an exempt homestead. Section 320 of the Code, dealing with the effect of a homestead declaration, does not preclude a creditor from contesting the declaration solely on the grounds that the landowner "was not entitled to a homestead. . . ."[71] These words have not been construed literally. All that is necessary to entitle a creditor to sell a particular tract of land under execution is that the proof show that neither the debtor nor his wife is entitled to claim the specific property as a homestead which is sought to be sold under the execution. If this were not so, a debtor could purchase a number of tracts of land and prevent a sale of any of them on the ground that he is entitled to a homestead. It is the function of the court in situations where disputes arise over homestead claims to determine if a claimant is entitled to an exemption.

A claimant may select as his homestead property in which he owns

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[66]MISS. CODE ANN. § 319 (1956).

[67]Ritter v. Whitesides, 179 Miss. 706, 176 So. 728 (1937).

[68]Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895).

[69]MISS. CODE ANN. § 320 (1956).

[70]Adams v. Bounds, 224 Miss. 518, 81 So. 2d 235 (1955).

[71]*Id.* at 531, 81 So. 2d at 240.

only an undivided interest.[72] It should be of no concern to the creditor that the claimant chooses as his homestead, property in which he owns only an undivided interest, if the interest does not exceed the statutory limit. If a claimant owns the entire interest in a tract of land and it does not exceed the statutory limit, the exemption will be valid if the claimant and property are properly qualified. The fact that the claimant only owns an undivided interest should not prevent him from claiming it as an exemption.

D. Allotment of the Homestead

In a situation where a claimant asserts his right to homestead exemption and has not made a selection by filing a declaration and his property exceeds 160 acres or $3,000 in value, the homestead will be allotted.[73] The officer holding an execution against the land of a claimant, usually the sheriff, will levy against the entire tract of land owned by him. The officer will notify the claimant and his creditor to select one householder or freeholder each. Those selected by the interested parties, together with one selected by the officer, shall allot the exempt homestead from the claimant's property. However, if a debtor or creditor fails to select a freeholder or if the one selected fails to act, the sheriff may select a substitute. When the homestead has been selected by the three freeholders or householders, it is set off and the levy and execution dismissed as to that part. The remainder of the debtor's land will be sold to satisfy the creditor.

In order to bring about the allotment the debtor who owns property subject to levy and execution, but claims his right to homestead exemption, should petition the court to have an allotment of the homestead made.[74] A debtor will not be allowed to make his own arbitrary selection of the homestead at the time of the levy and execution.[75] It is the duty of the chancellor to appoint an officer, usually the sheriff, to supervise the allotment of the homestead.[76] The supervising officer may not sell any part of a claimant's land without first properly allotting a homestead as provided by statute.[77]

It is improper for a court to determine the rights of the debtor and creditor by selecting a homestead from the evidence before it.[78] If the land of the debtor exceeds the statutory limits and a homestead has not been selected, the only proper method of selection is by allotment as provided by statute. A court is not qualified to make a proper

[72]Chapman v. White Sewing Mach. Co., 78 Miss. 438, 28 So. 735 (1900).

[73]Miss. Code Ann. § 323 (1956).

[74]Bruce Co. v. Spears, 181 Miss. 786, 794, 181 So. 333, 335 (1938).

[75]*Ibid.*

[76]See Howell v. Bush, 54 Miss. 437 (1877).

[77]Rhyne v. Guevara, 67 Miss. 139, 6 So. 736 (1889).

[78]Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895).

allotment of the homestead from the evidence before it because a knowledge of the land and its value is required. It is highly probable, on the other hand, that three fairminded, intelligent freeholders or householders, who are familiar with the land, could and would be able to make a selection with a reasonable degree of fairness and accuracy.

If a debtor or creditor should fail to select a freeholder or if he should refuse to act, the supervising officer may select an alternate to take his place.[79] Normally, if a debtor fails to select a freeholder to act as his representative in the allotment of his homestead, there is usually no reason for disqualifying the freeholder selected by the creditor.[80] The only result is that the officer in charge of the allotment must select two freeholders instead of one. There should be no objection by the debtor or creditor who fails to select a freeholder when the sheriff accepts the selection of the other party because when the sheriff puts the debtor's or creditor's freeholder under oath, he becomes in effect, the selection of the sheriff and not a representative of the party who selected him. If a debtor or creditor thinks that a freeholder is not qualified or is prejudiced or has acted unfairly in the allotment proceedings, he may have a review of the proceedings.[81]

When the sheriff has levied an execution against the land of a debtor in accordance with the statute, and a homestead has been properly allotted, the remainder of the land levied against is sold to satisfy the creditors.[82] After a homestead has been allotted to a debtor, he may not dispose of it and move on the remainder of his property and claim it as an exempt homestead.[83]

If the officer does not proceed as required by statute in making the allotment and attempts to sell the property of a debtor, the debtor may prevent the sale by obtaining an injunction.[84] The purpose of the allotment statutes is to prevent either the creditor or debtor from defeating the rights of the other by raising a conflict of evidence as to the value of the property. Therefore, if a debtor claims homestead exemption believing that his property is worth less than the statutory limit, but the creditor and officer proceed with a sale on the theory that the property exceeds the statutory limit, the debtor may obtain an injunction to prevent the sale until an allotment has been made and the value of the property determined.

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[79]Miss. Code Ann. § 323 (1956).

[80]Edwards Bros. v. Bilbo, 138 Miss. 484, 103 So. 209 (1925).

[81]Miss. Code Ann. §§ 325-26 (1956).

[82]See Richie v. Duke, 70 Miss. 66, 12 So. 208 (1892).

[83]Brantley v. Batson, 84 Miss. 411, 36 So. 524 (1904); Richie v. Duke, 70 Miss. 66, 12 So. 208 (1892).

[84]Willis v. Allen, 131 Miss. 264, 273, 95 So. 435, 436 (1923).

E. Selection of the Allotted Homestead

It is provided by statute that the allotted homestead should be composed of a tract of land, first in the form of a square, and second in the form of a parallelogram in contiguous tracts, if practical.[85] The only absolute requirements in allotting the homestead are that the land selected must not exceed 160 acres or the dollar value of the statutory exemption, and that the tract or tracts allotted must include the dwelling house.[86] Since the provision of the Code providing for the form of the homestead is directory instead of mandatory, the allotment does not have to be in the form of a square or parallelogram. It need not include the building, except the dwelling house, located on it or be composed of contiguous tracts. If the homestead cannot be allotted in one of the recommended forms and reference is made to the situation, value, and convenience of the land, and the rights of the creditor will not be sacrificed by the use of another form, such other form of allotment may be made as will appear fair, reasonable and not oppressive to the creditor. The statute is silent as to detailed subdivisions, and any form of allotment that does not sacrifice the rights of the debtor or creditor will be proper. It can easily be understood that an allotment in the recommended forms could be unfair to the parties because a particular square or parallelogram of land may be completely worthless, except for the dwelling house. Therefore each allotment must depend on the particular facts that govern it.

F. Property That Cannot Be Allotted

The legislature has provided that if the land of a claimant cannot be divided so as to set off a homestead, it shall be valued by freeholders selected in accordance with section 323 of the Code and if the value of the property exceeds the statutory exemption, the excess may be paid to the creditor by the landowner within sixty days and the land will not be sold. If the excess is not paid within sixty days of the valuation, the sheriff may sell the land and all proceeds over the amount of the statutory exemption will be paid to the creditor. The sum of the statutory exemption must be paid to the debtor in lieu of his homestead rights.[87] If a sale of the debtor's property will not bring in excess of $5,000, further action by the creditor must be abandoned and no further proceedings taken.[88]

IV. Value of the Homestead

If a property owner files a declaration of homestead exemption, he may claim up to 160 acres of land if the value does not exceed

[85]Miss. Code Ann. § 322 (1956).
[86]Wiseman v. Parker, 73 Miss. 378, 19 So. 102 (1895).
[87]Miss. Code Ann. § 324 (1956).
[88]See Dogan v. Cooley, 184 Miss. 106, 126-27, 185 So. 783, 790 (1939).

$5,000.[89] If the property owner fails to file a declaration but must have his homestead allotted, he is still entitled to 160 acres of land as long as it does not exceed the value of the statutory exemption.[90] In 1938 an amendment to section 317 of the Code declared that in ascertaining the value of the property all existing encumbrances on the property, including taxes and other liens, must be deducted from its actual value.[91] Code sections 318, 320, 322, 323, and 324 indicate that the amount of the statutory exemption is $3,000, while section 317, which was amended again in 1950, states the amount as $5,000. It has been held that the amount of the exemption is $5,000, but the court made no reference to the statutory conflict as to the amount of the statutory exemption.[92] The court has held that in order for homestead property to be sold in a situation where its actual value exceeds the statutory limit, the creditor must realize some substantial benefit from the sale.[93] It is obvious that if a homestead is subject to prior encumbrances, the judgment creditor will not benefit by its sale unless its value exceeds both the statutory limit and the prior encumbrances. If the value of the prior encumbrance is greater than the surplus over the statutory limit, the only person who would benefit from its sale would be the holder of the prior encumbrance. It was probably with this situation in mind that the legislature amended section 317 of the Code.

If an execution is levied on property during the lifetime of its owner, and he has not filed a declaration of homestead, the value of the property at the time of the allotment is controlling.[94] The allotted homestead may be reallotted during the life of its owner if its value increases. When the landowner dies, however, his death is the point at which the value of the homestead for his heirs at law is measured, and a subsequent appreciation or depreciation in value will not be grounds for a reallotment. If at the date of death of a landowner the allotted property is worth the full statutory amount, a subsequent depreciation in the value will not entitle his heirs to claim additional exempt property. Likewise, if the property allotted at the death of the owner did not exceed the statutory limit, a subsequent appreciation in value would not give the creditor a right to the excess.[95]

The limit in value of land that can be held as an exempt homestead is for the benefit of the creditor, in order to prevent an unreasonable amount of property from being held exempt from execution. The

[89]MISS. CODE ANN. §§ 317, 319 (1956).

[90]MISS. CODE ANN. § 322 (1956).

[91]MISS. CODE ANN. § 317 (1956).

[92]Davis v. Lammons, 246 Miss. 624, 151 So. 2d 907 (1963); Howell v. General Contract Corp., 229 Miss. 687, 701, 91 So. 2d 831, 836 (1957).

[93]See Dogan v. Cooley, 184 Miss. 106, 122-27, 185 So. 783, 788-91 (1939).

[94]Parisot v. Tucker, 65 Miss. 439, 4 So. 113 (1888).

[95]Moody v. Moody, 86 Miss. 323, 38 So. 322 (1905).

question of value, however, has no place in the consideration of the rights of the surviving widow and cotenants in the property. It is only in cases where the rights of creditors are involved that value is considered.[96]

V. Disposition of the Homestead

The conveyance of an exempt homestead does not change its status. The judgment creditor's rights are not affected by a conveyance of the exempt homestead.[97] A landowner has a right to convey his exempt homestead unaffected by a judgment of a creditor. Since the homestead is exempt, a judgment lien does not attach and cannot affect the rights of a grantor or grantee.

It has been declared by statute that if exempt property is disposed of by its owner, the proceeds of the sale will not become liable for the debts of its former owner.[98] The purpose of this statute is to give the landowner the right to retain the proceeds from a sale of his homestead, if a sale should become desirable.[99] The exemptionist also has the right to sell his homestead and reinvest the proceeds in another, without losing his exemption.

A. Descent of the Homestead

It is provided by statute that on the death of the exemptionist his exempt homestead will descend to his surviving spouse, children, and grandchildren as tenants in common.[100] If the deceased exemptionist's children predecease him, his grandchildren take the homestead *per stirpes*.[101] If no children or grandchildren survive the deceased exemptionist, his homestead will descend to his widow. If the exemptionist's spouse does not survive him, his children and grandchildren will take the homestead. An exception to the above general rules of descent of the homestead is provided for if the surviving spouse owns a residence equal in value to the homestead of the deceased exemptionist. In that situation, if the exemptionist's widow does not have any children or grandchildren by the exemptionist, but there are children or grandchildren of the exemptionist by another marriage, the homestead will not descend to the exemptionist's widow, but to the children or grandchildren by the other marriage.[102] The exempt homestead is not included in the administration of the deceased exemptionist's estate be-

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[96]Dickerson v. Leslie, 94 Miss. 627, 47 So. 659 (1909).

[97]De Bardeleben Coal Corp. v. Parker, 164 Miss. 728, 736, 144 So. 474, 475 (1933).

[98]Miss. Code Ann. § 329 (1956).

[99]Meacham v. Edmonson, 54 Miss. 746 (1877).

[100]Reed v. Reed, 197 Miss. 261, 19 So. 2d 745 (1944).

[101]Martin v. Martin, 84 Miss. 553, 36 So. 523 (1904).

[102]Miss. Code Ann. § 476 (1956).

cause it descends directly to his wife and children or grandchildren under the statute.

The statute governing the descent of the exempt homestead was never intended to interfere with the landowner's right to dispose of his homestead by will. Therefore, if the exempt property is disposed of by will, the statutes governing the descent of exempt property will not apply.[103] If a property owner disposes of his homestead by will, his widow can choose to renounce the will and take a share of the property by descent. If the widow chooses to renounce her share of the homestead under the will and takes a share by descent, she will take it with the same rights and privileges as if the husband had died intestate.[104]

VI. Rights of the Widow in the Homestead

It is provided by statute that when a landowner dies intestate and leaves a widow, to whom with others, his exempt property descends, it shall not be subject to partition or sale as long as she remains a widow and occupies or uses the homestead, unless she consents. This statute applies with like force when the wife dies and is survived by her husband.[105] As was mentioned above, on the death of an intestate exemptionist his exempt homestead descends under the statute governing the descent of exempt property.[106] Under the direction of the statute the homestead is not taken into account in administering the general estate of the deceased exemptionist. As far as the administration of the exemptionist's estate is concerned, it is as if the homestead property had never belonged to him.[107] The widow's right to a year's support allowance from her husband's estate cannot invade the homestead property.[108] Even though the right to a year's support allowance for the widow is a claim of the highest dignity,[109] it is not higher than the widow's homestead rights. The year's support allowance is of a temporary nature, while the homestead is designed for the protection and support of the family as long as it continues to exist. In the eyes of the law the family continues to exist at least as long as the widow lives. Therefore, a year's support allowance for the widow may not be taken from the homestead.[110]

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[103]Osburn v. Sims, 62 Miss. 429 (1884); Norris v. Callahan, 59 Miss. 140 (1881).

[104]Milton v. Milton, 193 Miss. 563, 567, 10 So. 2d 175, 178 (1942).

[105]Miss. Code Ann. § 428 (1956).

[106]Miss. Code Ann. § 476 (1956).

[107]Birmingham v. Birmingham, 53 Miss. 610 (1876).

[108]Miers v. Miers, 160 Miss. 746, 133 So. 133 (1931).

[109]First Nat'l Bank of Commerce v. Donald, 122 Miss. 681, 73 So. 723 (1916).

[110]Miers v. Miers, 160 Miss. 746, 133 So. 133 (1931).

When an exemptionist dies intestate, his widow takes a child's share of his estate in fee and also the rights of a widow in his exempt homestead.[111] The rights vested in the widow in the homestead are more like a life estate than any other interest.[112] The children and grandchildren of the deceased exemptionist are vested with a future interest in the homestead which takes effect at the termination of the widow's interest.[113] The widow's interest in the homestead continues for her life unless terminated by marriage, by ceasing to use or occupy the homestead, or by consent to the cotenants for a partition.[114] At the termination of the widow's life interest, the homestead descends to the children and grandchildren of the exemptionist by the general law of descent and distribution.[115] The children and grandchildren of the deceased exemptionist have no right to interfere with the widow's right to use or occupy the homestead.

The widow's rights are not dependent on her actual, physical occupation of the homestead. The words "or used" following "so long as it is occupied" in the statute clearly indicate that it is not necessary for the homestead to be physically occupied by the widow,[116] but as long as income from it is used for her support, whether she resides on it or not, it may not be partitioned without her consent.[117]

When the widow remarries she is no longer entitled to use or occupy the homestead, and it may be partitioned without her consent by the cotenants.[118] If the widow should convey her fee interest in the homestead but retain a life estate in it, she may continue to use or occupy the homestead as provided by the statute.[119] The sale of her fee interest in the homestead by a widow with the reservation of a life estate does not evidence consent to partition because she does not waive or dispose of her homestead rights. On the contrary, by reserving a life estate in the homestead, the widow expressly objects to a partition.

The status of a surviving widow and children of an exemptionist is one of cotenancy.[120] Even though this status is recognized, the usual

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[111]Stevens v. Wilbourn, 88 Miss. 514, 41 So. 66 (1906); Martin v. Martin, 84 Miss. 553, 36 So. 523 (1904).

[112]La Blanc v. Busby, 223 Miss. 415, 419, 78 So. 2d 456, 458, (1955); Medford v. Mathis, 176 Miss. 188, 193, 168 So. 607, (1936); Hardin v. Osborne, 43 Miss. 532, 537 (1870).

[113]Bohn v. Bohn, 193 Miss. 122, 136, 5 So. 2d 429, 432 (1942).

[114]Medford v. Mathis, 176 Miss. 188, 193, 168 So. 607 (1936).

[115]Birmingham v. Birmingham, 53 Miss. 610, 613 (1876); Miss. Code Ann. § 468 (1956).

[116]Miss. Code Ann. § 478 (1956).

[117]Wright v. Coleman, 137 Miss. 699, 715, 102 So. 774, 776 (1924); Tiser v. McCain, 113 Miss. 776, 74 So. 660 (1917).

[118]Jefcoat v. Powell, 235 Miss. 291, 108 So. 2d 868 (1959).

[119]Gresham v. Clark, 231 Miss. 206, 95 So. 2d 234 (1957).

[120]Bohn v. Bohn, 193 Miss. 122, 5 So. 2d 429 (1942).

rights of the parties thereunder are subordinated to the widow's homestead rights. As long as the widow survives, the children and grandchildren of the exemptionist have no present possessory interest in the homestead that they might sell or convey. The widow is not only entitled to the use or occupancy of the homestead, but also to the rent.[121] The rights of the widow in the homestead are absolute, and she cannot be compelled to account to her cotenants for her use or occupancy.[122] Since the homestead cannot be partitioned among the cotenants to the detriment of the widow, it would be inconsistent to allow the rents to be divided among the cotenants.[123] If the cotenants were allowed to receive their proportional share of the rents and profits during the widow's lifetime, she would in effect receive only a child's share, and the statute giving her exclusive use or occupancy would be rendered ineffective.[124] A widow, because of her exclusive right to the rents, may charge her cotenants rent for their use and occupancy of the homestead.[125] A widow is entitled to the exclusive use of the rent from the homestead and it may not be taken by the cotenants without liability to her. The widow may even go so far as to obtain an injunction to restrain her adult children from using or occupying any part of the homestead against her wishes.[126]

An exemptionist entitled to tax exemption under the "Homestead Exemption Act of 1946"[127] would appear to be obligated to pay the ad valorem taxes which may be in excess of or outside the tax exemption provisions. The obligation to pay such taxes would seem to be comparable to that of a life tenant, or a cotenant in possession.[128] And it is a well settled principle of law that a life tenant in possession of property and enjoying the income must pay the ordinary taxes. The widow may not deal with the homestead property to her advantage and to the detriment of her cotenants by permitting the tax title to mature in the state and then purchase the property for her own exclusive use.[129] If one of the cotenants to a homestead acquires a tax title, his purchase amounts to a payment of the taxes or a redemption and gives him no exclusive rights against the other cotenants, except for their failure to repay him their share of the tax payment.[130] The

121Miers v. Miers, 160 Miss. 746, 133 So. 133 (1931).

122Moody v. Moody, 86 Miss. 323, 328, 38 So. 322, 323 (1905).

123Bohn v. Bohn, 193 Miss. 122, 132, 5 So. 2d 429, 431 (1942); Stevens v. Wilbourn, 88 Miss. 514, 41 So. 66 (1906); Moody v. Moody, 86 Miss. 323, 328, 38 So. 322, 323 (1905); Martin v. Martin, 84 Miss. 553, 36 So. 523 (1904).

124Bohn v. Bohn, 193 Miss. 122, 132, 5 So. 2d 429, 431 (1942).

125*Id.* at 133, 5 So. 2d at 431.

126Stevens v. Wilbourn, 88 Miss. 514, 41 So. 66 (1906).

127Miss. Code Ann. §§ 9714-9743.5-11 (1956).

128Medford v. Mathis, 176 Miss. 188, 168 So. 606 (1936).

129La Blanc v. Busby, 223 Miss. 415, 420, 78 So. 2d 456, 458 (1955).

130*Id.* at 421, 78 So. 2d at 459.

confidential relationship between cotenants prevents one from obtaining an outstanding title to common property and using it to the detriment of the others.[131]

The widow's right to use or occupy the homestead is not affected by the source of her cotenant's title. The purchase of a cotenant's interest in the homestead by a third party at a tax sale does not affect the widow's right to the exclusive use or occupancy.[132] The fact that the purchaser at a tax sale is not an heir of the deceased exemptionist does not lessen the widow's rights. It must be remembered, however, that a homestead is not exempt from taxes, and a valid sale for taxes, which is not redeemed within the statutory period, will confer good title to the homestead. If the widow should redeem her interest in the homestead, she will acquire the full rights conferred upon her by statute.[133]

A homestead may be partitioned by the cotenants without the consent of the widow if she remarries or ceases to use or occupy the homestead.[134] The immunity from partition is a personal right of the widow only and does not extend to her grantee. Therefore, if the widow conveys her fee interest in the homestead and moves from it, it may be partitioned. The homestead may also be partitioned by the cotenants if the widow consents. The widow is not bound by her consent, however, if it is not made for a valuable consideration and she may withdraw it at any time up until final confirmation of the sale if some element of estoppel does not intervene.[135]

VII. The Rights of Cotenants in the Homestead

A cotenant who occupies jointly owned property may claim homestead exemption for his interest. The right to homestead exemption cannot be denied a cotenant because he does not own an exclusive interest in property and may be forced to partition.[136] The right to claim homestead exemption for property held in cotenancy is limited, in area and value, to the statutory limits. As long as a cotenant's interest in the jointly owned property does not exceed the statutory limits, it may be exempt. A cotenant who claims homestead exemption does not have a floating exemption on the entire tract of jointly owned property. If the interest owned by a cotenant exceeds the statutory limit, it may be sold and the excess applied to satisfy the creditors. A valid homestead exemption in the interest of one cotenant does not affect the interests or rights of the other cotenants.

[131]Shelby v. Rhodes, 105 Miss. 225, 62 So. 232 (1913); Beaman v. Beaman, 90 Miss. 762, 44 So. 987 (1907).

[132]Lackey v. Harrington, 162 Miss. 512, 139 So. 313 (1932).

[133]*Ibid.*

[134]Middleton v. Claughton, 77 Miss. 131, 24 So. 963 (1899).

[135]Tiser v. McCain, 113 Miss. 776, 74 So. 660 (1917).

[136]Lewis v. White, 69 Miss. 352, 13 So. 349 (1891).

A husband and wife may own a homestead as tenants in common. If a creditor obtains a judgment against the husband, he may claim homestead exemption for his interest.[137] If the value of a husband's interest in a homestead owned with his spouse exceeds the statutory limit, it may be sold and the excess applied to the judgment. The fact that a wife has an undivided interest in property in which the husband claims homestead exemption for his interest, does not endanger the wife's interest or enlarge the rights of the husband's creditors. The wife's interest in the homestead will be protected just as that of any other tenant in common. On the death of an exemptionist who owns property as a tenant in common, the other tenants may partition the property. The fact that the deceased tenant leaves a wife and children does not prevent his cotenants from partitioning the property because a homestead that descends to a widow and children can be protected from partition only if the deceased exemptionist owned all interest in it.[138]

VIII. Abandonment of the Homestead

The abandonment of a homestead by a landowner makes it liable to the claims of his creditors. The statute provides that whenever the debtor ceases to reside on his homestead, it will become liable for his debts unless his absence is temporary, caused by some casualty or necessity, and with the purpose of speedily reoccupying it as soon as the cause of the absence is removed.[139]

The language of the statute seems to leave little room for construction.[140] The statute requires actual residence on the property but provides that a temporary absence will not be an abandonment if it is the result of a casualty or necessity and the intent of the exemptionists is to speedily reoccupy his property as soon as the cause of the absence has subsided. Necessity has been defined by the court as a situation involving health, travel, official public duties, or private business emergencies that are temporary in character.[141] Casualty has been defined as an accident such as fire, flood, or social or family disaster.[142] These circumstances are only a few of those that could properly fall under the category of a casualty or necessity. As new situations develop, the category will be enlarged.

The intent of an exemptionist to speedily reoccupy a homestead he has left because of a casualty or necessity is the most important factor

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137Krippendorf v. Wolf, 70 Miss. 81, 12 So. 26 (1892).

138Solomon v. Solomon, 187 Miss. 22, 192 So. 10 (1939).

139Miss. Code Ann. § 328 (1956).

140Thompson, Lampkin & Co. v. Tillotoson, 56 Miss. 36, 39 (1878).

141*Id.* at 40.

142*Id.* at 40-41.

in determining if there is an abandonment.[143] The intent of the exemptionist to speedily reoccupy the homestead can have no weight in determining the existence of a casualty or necessity. If an exemptionist ceases to reside on his homestead for any reason other than a casualty or necessity, even if the absence is temporary, his intent to speedily reoccupy the homestead is of no consequence. To determine if an absence is justified, two questions should be answered affirmatively: Was the absence caused by a casualty or necessity? Was the absence temporary and with the intent to speedily reoccupy the homestead as soon as the cause was removed? If both questions can be answered affirmatively, the absence will not be an abandonment.

A temporary absence for the purpose of traveling or visiting will not be an abandonment of the homestead.[144] The court, in commenting on temporary absences, has said:

> To require the actual, literal, continuous, physical occupation of the homestead by some one or more of the family would turn a humane and beneficent law into one of imprisonment and punishment. It would subject the homestead, provided by a wise and liberal policy, to the casualties of life and the chances of unforeseen accidents; it would require of the family the precision of military regulations, and would demand an endless 'watch and ward,' which the law could never have contemplated.[145]

There is no abandonment of a homestead if a landowner moves his family from it temporarily for the purpose of educating his children.[146] Even if an exemptionist who is temporarily absent from the homestead for the purpose of educating his children should hold a public office, there will be no abandonment. The court has avoided placing an absence from the homestead for educational purposes under the category of a casualty or necessity, and in effect has created an exception to the general rule governing abandonment. It would seem, however, that by following the policy of liberally interpreting the homestead laws in favor of the claimant, the court could have easily classified the absence as a necessity.

There is no abandonment of the homestead if the absence is caused by bad health.[147] When the absence is caused by bad health it is a necessity and proof of an abandonment must be clear and decisive. If an exemptionist leaves his homestead because of bad health, he has

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[143]Moore v. Bradford, 70 Miss. 70, 11 So. 630 (1892).

[144]Jackson v. Coleman, 115 Miss. 535, 544, 76 So. 545, 546 (1917).

[145]Campbell v. Adair, 45 Miss. 170, 178-79 (1871).

[146]Gilmore v. Brown, 93 Miss. 63, 46 So. 840 (1908).

[147]Gardner v. Cook, 173 Miss. 244, 252, 158 So. 150, 152 (1935).

the right to lease it without losing his exemption in order to obtain income for the support of his family.[148]

There is no abandonment of a homestead if an exemptionist loses his means of support and must temporarily leave it in order to provide for his family.[149] The absence is a necessity. There will be an abandonment, however, if the exemptionist fails to return to his homestead when he regains his means of support. The situation is different, however, when the exemptionist leaves his homestead because of financial embarrassment or a better economic opportunity. If the exemptionist fails in a particular venture and moves to another city or state to seek greener pastures, he abandons his homestead.[150] It would seem that an absence resulting from economic failure could be classified as a casualty or necessity. But even if the absence is the result of a casualty or necessity, the court will rule that the exemption fails because the intent to return to the homestead is contingent upon the success or failure of the new business venture.[151] There can be no intent to speedily reoccupy a homestead if the return is dependent upon the success or failure of the new venture.

There can be no abandonment of a homestead if the exemptionist's absence is involuntary. If the exemptionist is forced to leave his homestead by some authority, the absence will be a casualty or necessity. Therefore, the court has held that if an exemptionist is arrested and confined to jail, there is no abandonment as long as he is in jail.[152] Under these circumstances there is no voluntary abandonment of the homestead. When the exemptionist is released from jail, however, he must return to his homestead or he will have voluntarily abandoned it.

IX. Conclusion

The Mississippi homestead exemption law has served well in the years since its enactment. It has provided the families of insolvent debtors with the security of homes, and those residing on rural land, a means of support. This success has been attributable, in a large measure, to a liberal interpretation by the court in favor of the debtor. Today, however, with the value of land and homes increasing steadily, it is apparent that the present limit on value that may be claimed as homestead exemption is antiquated. The various applicable sections of the Code conflict as to the amount of the exemption, but the main

[148]Jackson v. Coleman, 115 Miss. 535, 546, 76 So. 545, 546 (1917).

[149]Jackson v. Coleman, 115 Miss. 535, 76 So. 545 (1917); Collins v. Bounds, 82 Miss. 447, 34 So. 355 (1903).

[150]Bank of Hattiesburg v. Mollere, 118 Miss. 154, 79 So. 87 (1918).

[151]Adams v. Bounds, 224 Miss. 518, 532, 81 So. 2d 235, 241 (1955); Bank of Cruger v. Hodge, 189 Miss. 356, 198 So. 26 (1940); Bank of Hattiesburg v. Mollere, 188 Miss. 154, 79 So. 87 (1918).

[152]Lindsey v. Holly, 105 Miss. 740, 63 So. 222 (1913).

problem is the inability of the homestead value limit to adjust to changing economic conditions. It is obvious that the monetary exemption, which has been construed as $5,000 by the court, will not go far in covering the value of a home or 160 acres of land. The necessity of adjusting the maximum value of land that could be claimed as homestead has not been a serious problem in the past because the value of land and homes did not increase rapidly.

It is obvious that a liberal interpretation of the homestead law cannot solve this problem. The correct solution rests with the legislature. Although frequent legislative adjustments of the value of property that can be held as homestead can be only a temporary solution to the problem, it will correct some of the unbalance that now exists. It has been suggested that a possible solution to the problem is a self-adjusting exemption value which would expand and contract according to a formula applying current economic data.[153] This possible solution, however, has not been supplied with the formula that would make it workable. At present the only workable procedure seems to be for the legislature to evaluate the situation about every ten years, and supply the needed changes to the applicable sections of the Code.

Henry S. Davis, Jr.

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[153]Joslin, *Debtor's Exemption Laws: Time for Modernization*, 34 IND. L.J. 355, 364-65 (1959).

RECENT DECISIONS

Appearance—Privilege of Special Appearance Extended to Nonresident Defendant

Defendant, a nonresident individual, was sued in a Mississippi circuit court for a slander allegedly occurring in a single speech made by him in Mississippi. A special appearance was made by the defendant for the sole purpose of contesting the court's jurisdiction over his person. The circuit court dismissed the action for want of jurisdiction. Held: Affirmed. A nonresident defendant, individual or corporate, may appear specially for the sole purpose of objecting to the court's jurisdiction over his person, on the ground that he is not amenable to process issued by the courts of this state; and if the objection is overruled, a subsequent defense on the merits will not be deemed a waiver of the jurisdictional objection. *Mladinich v. Kohn*, 164 So. 2d 785 (Miss. 1964).

At common law an appearance made for the sole purpose of objecting to the court's in personam jurisdiction did not give the court jurisdiction for any other purpose.[1] A true special appearance is limited to the jurisdictional issue, and if such appearance is accompanied by any non-jurisdictional matter it will be considered a general appearance.[2] Whether an appearance is general or special depends on its substance rather than the title given to the appearance.[3] Calling an appearance special does not necessarily make it such. The effect of Rule 12(b) of the Federal Rules of Civil Procedure, which has been adopted by many states,[4] is to abolish the age-old distinction between general and special appearances and allow all defenses, jurisdictional and meritorious, to be presented together.[5] Where the defendant's objection to the jurisdiction has been overruled, there is a conflict of authority as to whether a subsequent participation on the merits acts as a waiver of the jurisdictional objection.[6] Most jurisdictions, including the federal courts, hold that further participation after an adverse ruling does not constitute a waiver of the objection.[7] A few jurisdictions apply the rule that the objection is waived by a plea to the merits after the objection has been overruled.[8] Each jurisdiction has its own peculiarities as to the nature and effect of a special appearance.

In referring to an appearance under section 1881,[9] the Mississippi Supreme Court has repeatedly stated, "that there is no such thing as a special appearance in our courts. . . . [W]hen a party comes in he

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[1] Restatement, Judgments § 19, comment c (1942, Supp. 1958).

[2] *E.g.*, Thompson v. Wilson, 224 Ala. 299, 140 So. 439 (1932).

[3] *E.g.*, Johannsen v. Mid-Continent Petroleum Corp., 227 Iowa 712, 288 N.W. 911 (1939).

[4] *E.g.*, Fla. R. Civ. P. 1.11(b).

[5] *E.g.*, Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 871, 874 (3d Cir. 1944).

[6] See generally Annot., 62 A.L.R.2d 937 (1958).

[7] *E.g.*, Speir v. Robert C. Herd & Co., 189 F. Supp. 436 (D. Md. 1960); Snyder v. Davison, 172 La. 274, 134 So. 89, 91 (1931).

[8] *E.g.*, Nelson v. Smith, 157 Ore. 292, 69 P.2d 1072, 1074 (1937).

[9] Miss. Code Ann. § 1881 (1956).

must come in entirely or else he must entirely stay away."[10] Although an appearance under section 1881 has never been held to operate as a waiver of subject-matter jurisdiction or territorial jurisdiction, it has been continually held to operate as a waiver of in personam jurisdiction.[11] Faced with this situation a nonresident defendant had two alternatives: (1) he could stay away entirely and collaterally attack any judgment which might result, or (2) he could submit to the jurisdiction of the court and defend on the merits. Over the years, however, certain so-called exceptions to the "no special appearance rule" arose which, in effect, were tantamount to a special appearance:[12] an appearance to remove a case to a federal court,[13] an appearance to plead immunity to service of process,[14] an appearance to deny jurisdiction where the defendant was brought into court by fraud or trickery,[15] a nonresident's appearance in attachment and garnishment cases where the *res* was not within the territorial jurisdiction of the court,[16] an appearance by a nonresident corporation to deny it was doing business in the state,[17] and, to some extent, an appearance amicus curiae.[18] It will be noted that these so-called exceptions are as comprehensive as the "no special appearance rule" itself, if not more so, and as a result have rendered it meaningless and mischievous.[19]

The present case not only clarifies the ambiguities that have arisen from the dictum in many cases dealing with section 1881, but also it definitely holds that section 1881 does not preclude a special appearance to raise the jurisdictional issue and lays down the method available to do so. Section 1881 will no longer be a thorn in the side of the jurisdiction-shy defendant, as the court clearly points out that section 1881 applies only to defective process or service, or lack of them, and not to in personam jurisdiction. The decision adheres to the majority view in requiring the special appearance to be limited to the jurisdictional issue alone and recognizes the rule of non-waiver of the jurisdictional objection after an adverse ruling thereon. Although this case is an important step forward, the situation could be further implemented and simplified by legislative adoption of a statute similar to Rule 12(b) of the Federal Rules of Civil Procedure which, as previously mentioned, abolishes the necessity of labeling an appearance as "general" or "special." Conceding the logic that a good system of justice strives to eliminate unnecessary litigation, it follows that adoption of such a statute would accomplish that end by allowing a defendant to incorporate in one answer both jurisdictional objections and meritorious

[10] *E.g.*, McCoy v. Watson, 154 Miss. 307, 310, 122 So. 368, 369 (1929).

[11] *E.g.*, Batson & Hatten Lumber Co. v. McDowell, 159 Miss. 322, 131 So. 880 (1931).

[12] See generally Note, *Special Appearance in Mississippi*, 19 Miss. L.J. 59 (1947).

[13] *E.g.*, McCoy v. Watson, 154 Miss. 307, 122 So. 368 (1929).

[14] Arnett v. Carol C. & Fred R. Smith, Inc., 165 Miss. 53, 145 So. 638 (1933).

[15] Nicholson v. Gulf, Mobile & No. R.R., 177 Miss. 844, 172 So. 306 (1937).

[16] *E.g.*, First Nat'l Bank v. Mississippi Cottonseed Prods. Co., 171 Miss. 282, 157 So. 349 (1934).

[17] *E.g.*, Arnett v. Carol C. & Fred R. Smith, Inc., 165 Miss. 53, 70, 145 So. 638, 642 (1933).

[18] *E.g.*, Revies v. Loyd, 205 F. Supp. 441 (W.D. La. 1962).

[19] Mladinich v. Kohn, 164 So. 2d 785, 793 (Miss. 1964).

defenses without fear of waiving any valid objections. No end is accomplished by requiring a special appearance to be made first before any additional matter may be joined; it only constitutes a trap for the unwary, lest he plead some meritorious matter and find himself having made a general appearance when such was not his intention.

Virgil G. Gillespie

CHILD CUSTODY—RIGHTS OF A PARENT AGAINST THIRD PARTIES

In a proceeding brought by a father to gain permanent custody of his ten-year-old son and twelve-year-old daughter from his divorced wife, the chancellor found the mother morally and spiritually unfit to have custody of the children. Although there was no finding that the father was mentally or morally unfit for custody or that he had abandoned the children, the chancellor placed them in an orphanage. The father appealed. HELD: Affirmed. The mental or moral suitability of a father or whether he had abandoned his children are not the sole criteria to be used in refusing him their custody when he fails to prove that their best interests would be served with him, and their custody under such circumstances may even be awarded to a third party. *Drew v. Drew,* 162 So. 2d 652 (Miss. 1964).

At common law the father had the paramount right to custody of his legally begotten children.[1] The father's common law preference was first abrogated in Mississippi by an 1860 case construing the divorce law.[2] This preference for the father was completely done away with by statute in 1922 and such statute still remains in force.[3] The court in 1900 held that it is presumed that the best interests of a child will be served by awarding custody to the parent, a presumption which can be overcome only by a showing that the parent was mentally or morally unfit to have custody or had abandoned the child.[4] Gradually, by permitting testimony tending to show that the best interests of the child would be served in the custody of a third person, the court allowed the presumption in favor of parental custody to be overcome even though there was no abandonment and even though the parent was not found mentally or morally unfit.[5] The presumption in favor of a parent is rebuttable by a clear showing of evidence with the burden of proof on the party seeking to gain custody of the child from the parent.[6] The presumption of parental custody of children is very strong and a parent's right to rear, educate, and control his children cannot be interfered with solely because some other person or institu-

[1]Cocke v. Hannum, 39 Miss. 423, 437 (1860).

[2]*Id.* at 438.

[3]MISS. CODE ANN. § 399 (1956).

[4]Hibbette v. Baines, 78 Miss. 695, 29 So. 80 (1900).

[5]Hutchins v. Moore, 231 Miss. 772, 97 So. 2d 748 (1957); Governale v. Haley, 228 Miss. 271, 87 So. 2d 686 (1956); Forbes v. Warren, 184 Miss. 526, 186 So. 325 (1939).

[6]*E.g.*, Sinquefield v. Valentine, 159 Miss. 144, 150, 132 So. 81, 82 (1931).

tion might be deemed better suited.[7] A parent has the right to rear his child in decent poverty if that be his lot.[8]

The instant case has unequivocally affirmed the recent trend to allow the welfare and best interests of the child to overcome the presumption in favor of a parent.[9] The court in the instant case lists certain criteria which a chancellor may use in determining whether the best interests and welfare of a child would be served in the parent's custody; they are: (1) the financial condition of the parent, (2) the type of Sunday schools and churches available, (3) the type of public schools which the children would attend, (4) the environmental conditions of the neighborhood where the children would live, and (5) the physical, financial, and moral condition of those with whom the children would be in close daily contact.[10] The father in the instant case failed to corroborate his testimony as to the foregoing criteria and was denied custody of his children for this reason. In all child custody cases between a parent and a third party the parent has never had to prove that the best interests of the children would be served with him; instead the court has consistently held that the burden of proof is on the person attempting to gain custody of the child from the parent.[11] The instant case has done away with the presumption in favor of a parent. Apparently the parent now has to prove that the best interests of his child would be served in his custody, that he is mentally and morally fit to have custody, and that he has not abandoned the child. Under prior rules it would seem that when the chancellor found the mother morally and spiritually unfit, and the father mentally and morally fit and that he had not abandoned the children, he would have no choice but to give custody to the father. This was followed even if the chancellor thought an orphanage would be a better place for the children; but this is not so according to the instant case. The chancellor now has broad discretion in determining who would best serve the interests and welfare of a child when the parent's right to a child's custody is being challenged by a third party.

John G. Gourlay, Jr.

Constitutional Law—Attorney Appointed by Court to Represent Indigent—Right to Just Compensation For Services

In compliance with a decision by the United States Court of Appeals,[1] the United States District Court appointed counsel to represent an indigent prisoner in proceedings on a motion to set aside a conviction and sentence for armed bank robbery. The court-appointed attorney, upon the suggestion and invitation of the court, petitioned for reasonable compensation for his services performed and expenses incurred in representing the indigent prisoner. Held: Judgment rendered

[7]Bryant v. Brown, 151 Miss. 398, 415, 118 So. 184, 188 (1928).

[8]Reynolds v. Davidow, 200 Miss. 480, 484, 27 So. 2d 691, 692 (1946).

[9]Drew v. Drew, 162 So. 2d 652 (Miss. 1964).

[10]*Id.* at 655.

[11]*E.g.*, Walker v. Williams, 214 Miss. 34, 42, 58 So. 2d 79, 81 (1952).

[1]Dillion v. United States, 307 F.2d 445, 451 (9th Cir. 1962).

against the government for expenses and reasonable compensation of $35.00 per hour, a total of $3804.54, the court ruling that an attorney appointed by the court as counsel for an indigent is entitled to reasonable compensation from the government for his professional expertise, service, time, and expenses. *Dillon v. United States*, 230 F. Supp. 487 (D. Ore. 1964).

Although the accused in a criminal action was guaranteed no right to legal counsel at common law,[2] legal representation is a constitutional right under the sixth amendment in this country, and this constitutional right now requires that an indigent be provided legal counsel in an appeal or attack of judgment of conviction as well as through his trial.[3] Moreover, the duty of affording counsel to an accused has been extended to the state courts by the fourteenth amendment.[4] It has been asserted that this constitutional guarantee declares a right in the accused, but imposes no liability upon the public for the payment of compensation to an assigned counsel.[5] This view has gained the support of a majority of the state courts,[6] where the opinion is expressed that gratuitous service on the part of an attorney is a matter of ancient custom, human sympathy, and professional obligation.[7] The attorney, it would appear, is deemed an officer of the court, and, having been given the privilege of practicing in the courts, is likewise burdened with duties and responsibilities to the court and the public.[8] The privilege to practice conferred by his license, then, is considered to be a court-appointed counsel's compensation.[9] Cases decided in Indiana, however, seem to indicate that the court of that state has rejected the notion that the legal profession has been endowed with any special privilege which would precipitate a corresponding obligation of gratuitous service,[10] and it has been held that a statute having the effect of forbidding the compensation of court-appointed attorneys is invalid.[11] In regard to the attorney's professional obligation in representing an indigent, the American Bar Association's Canons of Professional Ethics declare only that he should "exert his best efforts" and should not "ask to be excused for any trivial reason."[12] Some courts have recognized the desirability of allowing compensation for counsel's services, but have refused to create a contract for the state, reasoning that the power to provide for such

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[2]14 AM. JUR. *Criminal Law* § 167 (1938).

[3]Douglas v. California, 372 U.S. 353, 357 (1962).

[4]Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

[5]See Nabb v. United States, 1 Ct. Cl. 173 (1864); Annot., 130 A.L.R. 1439 (1941).

[6]See, *e.g.*, Dismukes v. Noxubee County, 58 Miss. 612 (1881); State v. Becker, 187 Mo. App. 501, 174 S.W.2d 181 (1943).

[7]Wayne County v. Waller, 90 Pa. 99, 105, 35 Am. Rep. 636, 640 (1879).

[8]See Arkansas County v. Freeman and Johnson, 31 Ark. 266 (1876); Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325 (1943).

[9]Johnson v. Whiteside County, 110 Ill. 22, 26 (1884).

[10]See Webb v. Baird, 6 Ind. 13 (1854).

[11]Knox County Council v. State, 217 Ind. 493, 513-14, 29 N.E.2d 405, 414 (1940); *but see* Miami County v. Mowbray, 160 Ind. 10, 66 N.E. 46 (1903).

[12]AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS, Canon Number 4.

compensation lies not with the courts, but with the legislative branch.[13] The Wisconsin court, while conceding that the court had no power to make a contract on behalf of the state, declared that the law giving the court power to appoint an attorney implied a promise to pay him just compensation.[14] While the Supreme Court of the United States has made no direct determination of the status of an attorney's services as compensable property, it appears that the lien held by a materialman[15] and the rights of a patentee[16] are considered property interests, the taking of which require a reasonable compensation.

A number of state legislatures have enacted statutes providing compensation for attorneys assigned to represent indigents.[17] The allowance has been limited in some states to attorneys assigned to represent an indigent person accused of committing a felony,[18] and the Mississippi statute falls within this category, although prior to a 1964 amendment,[19] such an allowance in Mississippi was limited to capital cases. At least one court has held that, while a court-appointed attorney is entitled to reasonable compensation in the absence of a statute specifying the amount payable,[20] the setting of a maximum fee by statute is not an unconstitutional taking of property without just compensation.[21] At the time of the decision in the instant case, there was no federal statute authorizing compensation of attorneys assigned by federal courts to represent indigents, but Congress has subsequently enacted the Criminal Justice Act of 1964,[22] which allows a court-appointed counsel compensation not to exceed $15.00 an hour and provides for payment of expenses.

Notwithstanding the fact that in the past indigents have, in most cases, been well represented by attorneys who served without compensation or with only the nominal compensation provided by a majority of the state statutes, there is a great deal of merit in some system of providing an adequate payment to a court-appointed counsel, and this is especially important with respect to the payment of expenses. It is conceivable that in many such cases, the attorney, even though he carries out his obligations with all diligence, would be enabled to perform a more exhaustive investigation and preparation if he were allowed expenses for this purpose. It must be borne in mind that the financial burden of preparing and presenting the defense on behalf of an indigent often falls upon attorneys who can least afford the expense. The potential impact of the decision becomes further expanded when con-

[13]See Nabb v. United States, 1 Ct. Cl. 173 (1864); Pardee v. Salt Lake County, 39 Utah 482, 118 Pac. 122 (1911).

[14]Dane County v. Smith, 13 Wis. 585, 587-88, 80 Am. Dec. 754, 756-57 (1861).

[15]See Armstrong v. United States, 364 U.S. 40 (1960).

[16]See United States v. Berdan Fire-Arms Mfg. Co., 156 U.S. 552 (1894); United States v. Palmer, 128 U.S. 262 (1888).

[17]See Annot., 130 A.L.R. 1439 (1941).

[18]*E.g.*, Code of Va. § 2505.

[19]Miss. H.B. 193 (1964), amending Miss. Code Ann. § 2505.

[20]Ferguson v. Pottawattamie County, 224 Iowa 516, 518-19, 228 N.W. 223, 224 (1938).

[21]Samuels v. Dubuque County, 13 Iowa 536, 538 (1862).

[22]78 Stat. 552 (1964).

sidered in the light of *Gideon v. Wainwright*,[23] where the court ruled that appointed counsel for an indigent defendant is a requirement in state as well as federal courts in all criminal actions. The next step, logically, would be to require that a just and reasonable compensation be paid to counsel appointed by a state court. If the ruling here is upheld by the higher federal courts and is eventually extended to the states by the fourteenth amendment, it remains to be seen whether or not the compensation under the existing state statutory provisions, usually amounting to only a fraction of the fee awarded in this action, would be upheld as reasonable and just compensation. The newly enacted federal legislation affords a more realistic figure for compensation of assigned counsel, and it may be expected that some states will follow this precedent of Congress.

Emmett Neil Young

Constitutional Law—Citizenship—Denationalization Statutes Must Apply to Native-Born and Naturalized Citizens Alike

Plaintiff, a German citizen by birth, acquired derivative American citizenship at age sixteen, later married a German national, and has resided in Germany with her husband for several years. In 1959 the United States denied plaintiff a passport contending that she had lost her American citizenship by residing continuously for three years in the country of her birth. Plaintiff brought action in a three-judge federal court against the Secretary of State seeking a declaratory judgment that she was still an American citizen and an injunction prohibiting application of the denationalization statute against her. The District Court for the District of Columbia affirmed plaintiff's loss of citizenship and refused the injunction.[1] Held: Reversed and remanded. That part of the Immigration and Nationality Act[2] that decrees loss of American citizenship of a naturalized citizen for residing continuously for three years in the country of his birth or former allegiance, because it applies only to naturalized citizens, constitutes discrimination so unjustifiable as to be violative of due process. *Schneider v. Rusk*, 84 Sup. Ct. 1187 (1964).

Denationalization[3] was a penalty in England in the early days of the common law as evidenced by the practices of outlawry,[4] sanctuary and abjuration,[5] and banishment.[6] Though the United States never

[23]372 U.S. 335 (1963).

[1]Schneider v. Rusk, 218 F. Supp. 302 (D.D.C. 1963).

[2]Immigration and Nationality Act § 352(a)(1), 66 Stat. 269 (1952), 8 U.S.C. § 1484(a)(1) (1958).

[3]The scope of this note does not include denaturalization where, due to fraud or other illegal means, true citizenship was never acquired.

[4]See generally 3 Holdsworth, A History of English Law 604-07 (4th ed. 1935).

[5]See generally *id.* at 303-07.

[6]See generally Craies, *The Compulsion of Subjects to Leave the Realm*, 6 L.Q. Rev. 388, 396-407 (1890).

recognized these practices, Congress did proclaim an inherent right of citizens voluntarily to expatriate themselves.[7] Expatriation was left unregulated until the Act of March 2, 1907,[8] which declared that a citizen was "deemed to have expatriated himself" when he voluntarily committed certain specified acts. Under this statute[9] naturalized citizens lost their citizenship by continuous residence for two years in the country of their former allegiance or for five years in any other foreign state. Other expatriatory acts listed in this early law applied to all citizens alike. Moreover, loss of citizenship was shifted from the former theory of express renunciation of allegiance by a citizen to one of presumption of loss by voluntarily committing a congressionally-established expatriatory act.[10] In 1940,[11] and again in 1952,[12] Congress completely revised and codified the laws relating to naturalization and citizenship; this legislation expanded and reiterated the former section whereby naturalized citizens were denationalized for residence abroad.[13] Until 1958, the constitutionality of denationalization statutes was generally assumed.[14] The Supreme Court has often held, however, that a citizen may not be deprived of his nationality unless he voluntarily commits an expatriatory act.[15] Once the act is committed, the citizen's loyalty to the United States or his intentions about retaining American citizenship are not a factor in the Court's application of this legislation.[16] By voluntarily voting in a foreign political election, even though the laws of that country allow aliens to vote, American citizenship is forfeited.[17] By voluntarily marrying an Englishman an American-born woman, even though she remained in the United States, expatriated herself and assumed her husband's allegiance because of the single-identity theory of husband and wife prevailing at that time.[18] In at least these two opinions the Court has recognized a power in Congress to expatriate where allegiance to this country is involved.

Prior to the noted case, in only one instance has residence abroad of a naturalized citizen been material, and though the statute was held not to apply to a retired naval officer, its constitutionality remained

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[7]Act of July 27, 1868, ch. 249, § 1, 15 Stat. 223.

[8]Act of March 2, 1907, ch. 2534, 34 Stat. 1228.

[9]Act of March 2, 1907, ch. 2534, § 2, 34 Stat. 1228.

[10]Boudin, *Involuntary Loss of American Nationality*, 73 HARV. L. REV. 1510, 1513 (1960).

[11]Act of October 14, 1940, ch. 876, 54 Stat. 1137.

[12]66 Stat. 163 (1952), 8 U.S.C. §§ 1101-1503 (1958).

[13]66 Stat. 269 (1952), 8 U.S.C. § 1484 (1958); Act of October 14, 1940, ch. 876, § 404, 54 Stat. 1170.

[14]Maxey, *Loss of Nationality: Individual Choice or Government Fiat?*, 26 ALBANY L. REV. 151, 171 (1962).

[15]See, *e.g.*, Mitsugi Nishikawa v. Dulles, 356 U.S. 129 (1958).

[16]Hurst, *Can Congress Take Away Citizenship?*, 29 ROCKY MT. L. REV. 62, 66 (1956).

[17]See Perez v. Brownell, 356 U.S. 44 (1958).

[18]Mackenzie v. Hare, 239 U.S. 299 (1915). The Act of March 2, 1907, ch. 2534, § 3, 34 Stat. 1228, which was controlling in this case was modified by the Act of September 22, 1922, ch. 411, § 7, 42 Stat. 1022, and has been repealed by the Act of March 3, 1931, ch. 442, § 4, 46 Stat. 1511.

unquestioned.[19] More recently, however, the penalty provisions have been struck down by the Court. The war powers granted to Congress do not include the authority to expatriate a citizen convicted by court-martial of desertion from the United States Army during wartime, such penalty being violative of the eighth amendment ban on cruel and unusual punishments.[20] Automatic loss of citizenship for leaving or remaining outside the United States to evade wartime military service, without any type of hearing, violated the procedural safeguards guaranteed by the fifth and sixth amendments.[21] The Constitution grants to Congress the power to prescribe a uniform rule of naturalization.[22] The Court holds, however, that the rights of citizenship once acquired by naturalization are coextensive with those of native-born citizens and may not be enlarged or abridged.[23] Further, the constitutional requirement of due process is not met when a citizen is expatriated automatically as an administrative convenience without any prior judicial or administrative proceedings.[24] The dissenting opinion in the noted case reaffirms the Court's historical position that Congress does have the power to expatriate and should be allowed to resolve the difficulties created by naturalized citizens residing abroad.[25]

The foregoing shows that even though the Court recognizes an expatriatory power in Congress where an act of non-allegiance is involved, it will not allow a citizen to be denationalized per se as punishment for a criminal or non-criminal act without the safeguard of some proper administrative or judicial determination. Nor may any distinction be made between the rights of the native-born and those of the naturalized citizen. The legislative history of the denationalization statutes indicates that one of Congress' primary aims is to avoid the diplomatic entanglements occasioned by persons having two nationalities. Therefore in future legislation Congress, making no distinction between native-born and naturalized, might redefine allegiance in light of dual nationality and provide that the only allegiance of an American citizen can be to the United States. Since there are other satisfactory remedies at law, punitive denationalization statutes should be repealed.

Orley R. Lilly, Jr.

Constitutional Law—Equal Protection Clause Applied to Apportionment of Bicameral Legislature

Qualified voters of Alabama filed a complaint in federal court challenging the apportionment of the Alabama legislature. They alleged deprivation of rights under the equal protection clause of the fourteenth amendment. In April 1962 a three-judge district court reset

[19]United States v. Gay, 264 U.S. 353 (1923).

[20]Trop v. Dulles, 356 U.S. 86 (1958).

[21]Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[22]U.S. Const. art. I, § 8.

[23]Schneider v. Rusk, 84 Sup. Ct. 1187, 1189 (1964); Osburn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 827 (1824).

[24]Schneider v. Rusk, 84 Sup. Ct. 1187, 1190 (1964).

[25]*Id.* (dissenting opinion).

the case and stated that if the legislature failed to reapportion itself prior to the November election of that year, the court would take action. On July 12, 1962, an extraordinary session of the legislature adopted two reapportionment plans to take effect for 1966. The first, a proposed constitutional amendment, provided for a house of representatives of one hundred and six members to be composed of one representative from each of the state's sixty-seven counties, with the remaining seats to be filled according to population. The senate was to consist of sixty-seven members, one from each county. The other plan was standby legislation to be implemented if the amendment failed of passage. This scheme made provision for a senate to be composed of thirty-five members and representing thirty-five districts established along county lines. This plan provided that each county would be entitled to one representative in the house, comprised of one hundred and seven seats, and that the remaining seats would be apportioned according to a rough population standard. On July 21, 1962, the district court held that each of the plans was discriminatory under the equal protection clause and ordered a temporary plan into effect for the November election consisting of the provisions relating to the house in the proposed amendment and that pertaining to the senate in the alternative plan. A permanent injunction was not issued in order to give the legislature an opportunity to reapportion itself according to the court's finding. State officials were enjoined from holding elections under any of the apportionment plans found unconstitutional. HELD: Affirmed. The equal protection clause requires that the seats of both houses of a bicameral state legislature must be apportioned on the basis of population. *Reynolds v. Sims*, 84 Sup. Ct. 1362 (1964).

Prior to 1962 the Supreme Court consistently refused to hold that the power of a state to determine the electoral weight of its respective subdivisions was subject to restriction under the equal protection clause of the fourteenth amendment.[1] Indeed it was held specifically that state legislative apportionment was not a proper subject for the invocation of the equal protection clause.[2] The rationale of these cases was posited on the theory that there was no substantial federal question involved[3] and thus no justiciable controversy. Such issues were deemed to be political questions and outside the realm of federal jurisdiction.[4] Then, in *Baker v. Carr*[5] the Court, in a radical departure from established patterns of judicial review, rendered a precedent-shattering decision holding that a claim under the fourteenth amendment assailing the constitutionality of a state's legislative apportionment on the basis that the voting rights of certain citizens were, by being debased, consequently impaired, presented a justiciable question subject to adjudication by federal courts. It was later held in *Gray v. Sanders*[6] that the county unit system, applied in Georgia to the weighting of votes in state primary elections, was unconstitutional since the votes of certain

[1] See, *e.g.*, Colegrove v. Greene, 328 U.S. 549 (1946).

[2] *E.g.*, Colegrove v. Barrett, 330 U.S. 804 (1947).

[3] *Ibid.*

[4] See, *e.g.*, Renny v. Smith, 102 F. Supp. 708 (E.D. Pa. 1951), *aff'd*, 342 U.S. 916 (1952) (per curiam).

[5] 369 U.S. 186 (1962).

[6] 372 U.S. 368 (1963).

citizens were consequently diluted. The Court reached the conclusion that "political equality can mean only one thing—one person, one vote."[7] In *Wesberry v. Sanders*[8] the Court determined that the constitutional mandate that representatives in Congress be chosen "by the People"[9] meant that one man's vote is to be worth as much as another's. The majority concluded by stating that the Constitution's plain objective was to make equal representation for equal numbers of people the fundamental goal for the House of Representatives.[10]

The majority decision was the progeny of *Baker, Gray,* and *Wesberry*—the culmination of the development of the doctrine that each person's vote is worth as much as that of any other person. The Court, in relying upon *Gray* and *Wesberry,* deduced from the former the principle that equality exists as among voters within a state, and from the latter the proposition that representative government in this nation amounts to equal representation for equal numbers of people, regardless of other considerations. The majority reasoned that since a citizen has the inalienable right to full participation in the process of electing state legislators, his right to vote is unconstitutionally impaired when the votes of some are weighted more heavily than his own. The opinion further rejected as irrelevant the suggested analogy between the relationship of the county and state and that of the state and national government, the reasoning being that the two relationships are conceptually different in that states are separate government entities that have surrendered formerly held powers and that counties are not distinct entities but were conceived by the states only to expedite the implementing of government functions. Mr. Justice Harlan, dissenting, noted that *Baker* decided only that reapportionment claims are justiciable, that the court in *Gray* expressly noted that no consideration was being given the application of the one-man one-vote theory to legislative apportionment, and that *Wesberry* was decided, not under the fourteenth amendment, but rather under Article 1, section 2 of the Constitution. In unequivocally rejecting the applicability of the equal protection clause to legislative apportionment problems, he argued that the majority's insistence on the pertinence of the equal protection clause constituted an unexplainable disregard of section 2 for the fourteenth amendment, which expressly recognizes the state's power to deny or abridge the rights of its citizens to vote for legislators and which provides for a remedy in corresponding reduction of the state's congressional representation.

It is believed that the court, in holding that both houses of a state legislature must be apportioned on a population basis, has failed to properly consider the basic nature of representative government. Concededly there is merit in granting to each individual full and effective participation in selection of legislators. However, it is submitted that the essential character of representative government requires that regional interests be accorded consideration in apportioning a legislature. Indeed, there are many sparsely populated counties whose importance to the state far exceeds its population as compared with that of the state. Therefore there is a rational basis for setting up an apportionment

[7] *Id.* at 381.
[8] 376 U.S. 1 (1964).
[9] U.S. CONST. art. I, § 2.
[10] Wesberry v. Sanders, 84 Sup. Ct. 526, 535 (1964).

scheme on a territorial basis. It is submitted that the proper solution to the apportionment problem is to allow for the individual's right to vote by providing for one house apportioned on the basis of population and to accord regard to the regional groups by apportioning the second house primarily on the basis of political subdivisions. The apportionment in this second house would emphasize county representation, but the most populous counties could be granted more seats than the others to prevent the existence of gross disparities. It is emphasized that the representation of the counties would not approach a condition so as to be regarded as in proportion to population, but that the purpose of the greater representation for the most heavily populated counties would be merely to prevent gross inequities.

Tom S. Lee

Constitutional Law—Fifth Amendment Privilege Against Self-Incrimination Applicable to the States Through the Fourteenth Amendment

The petitioner was convicted in 1959 in Connecticut after pleading guilty to a charge of pool-selling, a misdemeanor, and his one year sentence was suspended after ninety days. In 1961, he was subpoenaed to appear before a referee who was inquiring into the existence of gambling and ordered to testify. The state's attorney asked him several questions which he refused to answer claiming the privilege against self-incrimination contained in both the federal and state constitutions. Because he declined to explain how his answers would incriminate him, as required by the state standard, the privilege was denied and he was imprisoned for contempt of court. The Connecticut Supreme Court of Errors sustained the denial of petitioner's writ of habeas corpus holding that the fifth amendment privilege against self-incrimination was not available to a witness in a state proceeding and that the petitioner had not properly invoked the state privilege which required a less stringent standard than that of the federal privilege. Held: Reversed. The due process clause of the fourteenth amendment guarantees a witness in a state proceeding the protection of the fifth amendment privilege against self-incrimination, and this guarantee is to be enforced by the same standard applicable to federal proceedings. *Malloy v. Hogan*, 84 Sup. Ct. 1489 (1964).

Prior to the ratification of the fourteenth amendment, the provisions of the Bill of Rights were held to be limitations on the federal government only and not applicable to the states.[1] The government's interest in securing information about criminal activity led to the introduction of immunity statutes on the federal[2] and state[3] level to circumvent the

[1]*E.g.*, Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[2]See generally Dixon, *The Fifth Amendment and Federal Immunity Statutes* (pts. 1-2), 22 Geo. Wash. L. Rev. 447, 554 (1953-1954); see also 8 Wigmore, Evidence § 2281, at 495 n.11 (McNaughton rev. 1961) (list of the various federal immunity statutes).

[3]See generally 8 Wigmore, Evidence § 2281, at 495 n.11 (McNaughton rev. 1961) (state immunity statutes, either granting full immunity or prohibiting the use of compelled testimony).

operation of the privilege against self-incrimination contained in the federal constitution and in most state constitutions.[4] The grant of immunity, in order to displace the right of the witness to remain silent, must be coextensive with the privilege if the jurisdiction involved is to have the power to compel testimony.[5] It was early settled that under a federal grant of immunity the protection would extend to preclude prosecution in a state proceeding based on the compelled testimony.[6] However, since the sovereign can only grant immunity coextensive with its jurisdictional boundaries,[7] a state grant of immunity did not prevent prosecution in a federal proceeding.[8] The position of the Court since *Twining v. New Jersey*[9] has been that the fifth amendment privilege against self-incrimination did not apply to the states through the fourteenth amendment.[10] Because of this position the witness in a state proceeding was led into a dual sovereignty dilemma.[11] If the witness refused to answer after a grant of state immunity, he could have been held in contempt of the state court.[12] On the other hand, had he answered the question, federal officials could have used his testimony in a federal prosecution.[13] The witness was presented with a further dilemma in those jurisdictions which permitted comment on the witness' refusal to answer when he claimed the privilege against self-incrimination.[14]

Ever since Mr. Justice Harlan's dissent in *Twining v. New Jersey*,[15] which was strengthened and animated by the four man dissent in *Adamson v. California*,[16] the Court has been divided over whether the fifth amendment guarantee against self-incrimination is applicable to the states through the due process clause of the fourteenth amendment.[17] In a recent utterance of that view by the Court,[18] Mr. Justice Brennan expressed both a dissatisfaction with the holding and a willingness to re-examine the issue.[19] The Court has departed from the narrow holding of *Twining* and *Adamson* in recent years by refusing to uphold convictions in state courts based upon coerced confessions.[20] The Court

[4]See generally 8 WIGMORE, EVIDENCE § 2252, at 319 n.3 (McNaughton rev. 1961) (list of state provisions, constitutional, statutory, and judicial).

[5]See, *e.g.*, Counselman v. Hitchcock, 142 U.S. 547 (1892).

[6]Brown v. Walker, 161 U.S. 591, 607-08 (1896).

[7]*E.g.*, Jack v. Kansas, 199 U.S. 372, 380 (1905).

[8]*E.g.*, Knapp v. Schweitzer, 357 U.S. 371, 379 (1958).

[9]211 U.S. 78 (1908).

[10]Adamson v. California, 332 U.S. 46 (1947); *cf.* Knapp v. Schweitzer, 357 U.S. 371 (1958).

[11]United States v. Murdock, 284 U.S. 141, 149 (1931); see Feldman v. United States, 322 U.S. 487 (1944).

[12]Knapp v. Schweitzer, 357 U.S. 371, 379 (1958).

[13]*E.g.*, Feldman v. United States, 322 U.S. 487, 493 (1944).

[14]See generally 8 WIGMORE, EVIDENCE § 2272, at 427 n.2 (McNaughton rev. 1961).

[15]211 U.S. 78, 114 (1908).

[16]332 U.S. 46, 68, 123 (1947).

[17]*E.g.*, Cohen v. Hurley, 366 U.S. 117 (1961).

[18]*Ibid.*

[19]*Id.* at 159 (dissenting opinion).

[20]*E.g.*, Brown v. Mississippi, 297 U.S. 278 (1936).

has been increasingly ready to review state criminal convictions by using a subjective, case-by-case approach under the due process clause of the fourteenth amendment.[21] This willingness to re-examine the decisions holding that the fifth amendment is not applicable to the states can be seen from the application of other provisions contained in the Bill of Rights to the states through the fourteenth amendment. At the present time all of the first amendment protections—freedom of speech,[22] press,[23] religion,[24] assembly,[25] and association[26]—have been held immune from state abridgment. The fourth amendment right to privacy contained in the search and seizure clause has been declared enforceable against the states through the fourteenth amendment.[27] In addition, the decision of *Gideon v. Wainwright*,[28] overruling *Betts v. Brady*,[29] held that the provision of counsel guaranteed by the sixth amendment in all criminal cases was obligatory on the states by reason of the fourteenth amendment. Also, the decision of *Robinson v. California*[30] made applicable to the states the eighth amendment prohibition of cruel and unusual punishment. The Court's decision in the instant case, by including the fifth amendment privilege against self-incrimination into the fourteenth amendment, guarantees a witness in any court protection against self-incrimination.[31]

The decision of this case is one of the many recent decisions of the Court enlarging the scope of the due process clause of the fourteenth amendment and affording it a more central role in the preservation of the liberties of individual citizens guaranteed by the federal constitution. While the decision of this case ends the confusion heretofore caused by the dual sovereignty concept by imposing on the states the federal standard in their application of the self-incrimination privilege, it will of necessity call for changes of procedure in those states whose standards differ materially from those of the federal government. By insuring uniformity, it provides a basis for extending state immunity grants to preclude prosecution in a federal proceeding.[32] The holding reaffirms the recognition that criminal prosecutions are accusatorial and not inquisitorial.[33] It should be noted that a federal question will now be raised when a state denies to a witness the privilege against self-incrimination. In the light of the Court's recent decisions including the various provisions of the Bill of Rights into the operation of the due

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[21]See, *e.g.*, Haynes v. Washington, 373 U.S. 503 (1963).

[22]*E.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925).

[23]*E.g.*, Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

[24]*E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[25]*E.g.*, De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

[26]*E.g.*, Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[27]Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[28]372 U.S. 335, 344 (1963).

[29]316 U.S. 455 (1942).

[30]370 U.S. 660, 666 (1962).

[31]Malloy v. Hogan, 84 Sup. Ct. 1489, 1491 (1964); *cf.* Hoffman v. United States, 341 U.S. 479 (1951).

[32]Murphy v. Waterfront Commission of New York Harbor, 84 Sup. Ct. 1594 (1964) (decided same day as noted case).

[33]Malloy v. Hogan, 84 Sup. Ct. 1489, 1493 (1964).

process clause of the fourteenth amendment, it may be expected that soon all of the provisions in the first eight amendments will be made applicable to the states.

James W. Burgoon, Jr.

Criminal Contempt of Court—Constitutional Right to Trial by Jury

Criminal contempt proceedings were instituted against the Governor and Lieutenant Governor of Mississippi by the United States upon specific order of the Court of Appeals for the Fifth Circuit. The basis of the suit was contemners' alleged disobedience of three injunctions which prohibited interference with the enrollment of a Negro applicant at the University of Mississippi. Contemners contended, *inter alia*, that they were entitled to a jury trial as a matter of constitutional right. The Court of Appeals, being evenly divided on that question, certified the issue to the Supreme Court. Held: In criminal contempt cases the accused is not entitled to a jury trial as a matter of constitutional right. *United States v. Barnett*, 84 Sup. Ct. 984 (1964).

At early common law certain distinctions between the various types of contempts developed.[1] A direct contempt was one committed in the presence of the court so that summary punishment without a jury was considered "just," since the facts constituting the contempt were in actual view of the court.[2] Indirect contempts were those committed outside the court, thus making it necessary to empanel a jury to determine issues of fact.[3] The theory that indirect contempts were punishable by summary judgment originated in the Star Chamber.[4] The Chamber was abolished in 1641, but its established trend of summary punishment for all contempts filtered into the common law courts.[5] In this setting the First Congress passed the Judiciary Act of 1789 authorizing the federal courts to punish contempts by fine or imprisonment.[6] In 1889 the Supreme Court, following the common law, started a line of decisions rejecting jury trials in contempt cases.[7] Throughout this line of precedents proponents of summary judgments have attempted to make a distinction between criminal contempts and criminal acts.[8] Criminal contempt is said to be procedural in nature and is therefore technically different from a statutory violation constituting a crime.[9] The rule evolving from these decisions that contemners are not entitled to a jury trial as a matter of constitutional right was made more

[1] Fox, *Eccentricities of the Law of Contempt of Court*, 36 L.Q. Rev. 394, 396-97 (1920).

[2] See Beale, *Contempt of Court, Civil and Criminal*, 21 Harv. L. Rev. 161, 171-72 (1908).

[3] See Fox, *The Nature of Contempt of Court*, 37 L.Q. Rev. 191 (1921).

[4] Comment, 57 Mich. L. Rev. 258, 260 (1958).

[5] *Ibid.*

[6] Judiciary Act of 1789, ch. 20, § 17(a), 1 Stat. 83.

[7] See *In re* Savin, 131 U.S. 267 (1889).

[8] *Cf.* Gompers v. United States, 233 U.S. 604, 610 (1914).

[9] See Beale, *Contempt of Court, Civil and Criminal*, 21 Harv. L. Rev. 161, 173 (1908).

explicit in *Green v. United States*.[10] In that case contemners were sentenced to three years' imprisonment for failure to surrender for execution of their sentences after being found guilty in a former trial of violating the Smith Act.[11] According to the *Green* case the severity of the penalty does not affect the constitutionality of summary judgments in criminal contempt cases.[12]

In the instant case the majority holds that the triviality or severity of the *offense* should have no effect on the constitutionality of non-jury trials in criminal contempt cases.[13] However, the majority explains in a footnote that some members of the Court feel that summary punishment without a jury is constitutionally limited to only such *penalties* as may be inflicted for petty offenses.[14] The Court states in the body of its opinion that the guarantees of the Constitution for jury trials in criminal cases were not intended to apply to criminal contempts. In support of this view the Court observes that the First Congress, composed of many of the men who drafted the Constitution, made criminal contempts punishable by summary judgment.[15] The dissenting justices, on the other hand, note that at the time of the founding of the Constitution trial by summary punishment was limited to those criminal offenses considered petty and that the penalties inflicted were trivial.[16] They further argue that the majority's conclusions are based on historical error, pointing out that not until recently have punishments in contempt cases become severe.[17] The dissenters feel that there should be no distinction between criminal contempts and other criminal prosecutions and that, in any violation of the law which is punishable by a severe penalty, a jury trial is required by the Constitution.[18]

The Constitution clearly guarantees a jury trial in all criminal prosecutions except in cases of impeachment.[19] If indirect criminal contempts are considered "crimes"[20] and if the punishment inflicted may be severe,[21] it seems that the scope of the Constitution was intended to include jury trials in indirect contempt cases. The dictum added in footnote twelve of the Court's opinion creates an ambiguity which indicates a limitation on the holding of the *Green* case. By adding the dissenting members to those of the majority approving this dictum, it appears that a majority of the members of the Court now feel that punishment for indirect contempts may be summarily exercised only if

[10]356 U.S. 165, 183 (1958).

[11]*Id.* at 167.

[12]See Green v. United States, 356 U.S. 165, 183 (1958).

[13]United States v. Barnett, 84 Sup. Ct. 984, 991 (1964); *accord*, Green v. United States, *supra* note 12 at 183.

[14]United States v. Barnett, *supra* note 13 at 992.

[15]Judiciary Act of 1789, ch. 20, § 17(a), 1 Stat. 83.

[16]United States v. Barnett, 84 Sup. Ct. 984, 1017 (1964); *accord*, District of Columbia v. Clawans, 300 U.S. 617, 624 (1937).

[17]United States v. Barnett, *supra* note 16 at 1019; *accord*, Comment 57 MICH. L. REV. 258, 264 (1958).

[18]United States v. Barnett, *supra* note 16 at 1021; *accord*, Green v. United States, 356 U.S. 165, 208-10 (1958) (Black, J., dissenting).

[19]U.S. CONST. art. III, § 2; U.S. CONST. amend. V-VI.

[20]See Gompers v. United States, 233 U.S. 604, 610 (1914).

[21]See Green v. United States, 356 U.S. 165, 209 (1958).

the penalty involved is trivial. It is submitted that this limitation will ultimately lead to the use of juries in all indirect criminal contempt cases when either the offense or the punishment is severe.

Landman Teller, Jr.

PLEADING AND PRACTICE—PENALTY FOR FAILURE TO ANSWER INTERROGATORIES—RIGHT OF PLAINTIFF TO VOLUNTARY NONSUIT WHERE ADVANTAGE HAS ACCRUED TO THE DEFENDANT

Plaintiff filed a declaration and had proper process served on the defendant after which the defendant mailed interrogatories to the plaintiff. The plaintiff failed to bring the case to trial in the January term of court, and it was continued. At the July term he had the case properly docketed and appeared at the trial without ever having answered the interrogatories. The defendant moved to have the declaration dismissed with prejudice pursuant to code section 1712. At the hearing on the motion the plaintiff's attorney testified that the failure was due to his negligence and asked that his client not be penalized. The trial judge overruled the motion, but announced that he would not require the defendants to be put to the burden that a continuance would cause. He thereupon gave the defendant the option of forcing the plaintiff to trial at that term of court or of taking a continuance and having the interrogatories answered promptly. The plaintiff at that point moved for a voluntary nonsuit which the trial judge sustained, dismissing the case without prejudice with cost to the plaintiff. HELD: Affirmed. The statute on interrogatories gives the court power to extend the time for filing answers for good cause in order to avoid the harshness of a prejudicial dismissal where circumstances fail to warrant such a penalty; but the plaintiff may nonsuit at any time before the jury retires regardless of motive. *Williams v. Whitfield,* 163 So. 2d 688 (Miss. 1964).

Though discovery procedures were largely nonexistent at common law, during the last century methods for the examination of adverse parties were enacted by statute in almost every jurisdiction.[1] To give force to these procedures sanctions for failure to comply have been supplied.[2] These sanctions vary with the procedure, the jurisdiction, and the circumstances. The most commonly encountered penalties are: subjecting the defaulting party to penalty for contempt;[3] dismissal with prejudice;[4] judgment by default or decree pro confesso;[5] taking the interrogatories as confessed;[6] considering the case as if no evidence had been given on the issue;[7] striking the defaulting party's pleading;[8] direct-

[1]Triplett, *Hocus-Pocus Legal Procedure—a Need for Reform,* 16 Miss. L.J. 9, 15 (1943).

[2]*E.g.,* FED. R. CIV. P. 37.

[3]*E.g.,* Palm Shores Inc. v. Nobles, 149 Fla. 103, 5 So. 2d 52, 53 (1941).

[4]*E.g.,* Naive v. Jones, 353 S.W.2d 365, 366 (Ky. 1961).

[5]*E.g.,* Melvin v. Scowley, 213 Ala. 414, 104 So. 817, 820 (1925).

[6]*E.g.,* Fonteuot v. Ludeau, 191 La. 540, 553, 186 So. 21, 25 (1938).

[7]*E.g.,* Melvin v. Scowley, 213 Ala. 414, 104 So. 817, 820 (1925).

[8]*E.g.,* Interchemical Corp. v. Uncas Printing and Finishing Co., 39 N.J. Super.

ing a nonsuit without prejudice;[9] ordering a continuance until full answers are made;[10] or taxing the defaulting party with costs.[11] At an early date courts recognized that dismissal with prejudice was a drastic penalty and should only be imposed in an extreme case.[12] Most of our courts have continued to take this view,[13] and in a recent federal case this principle was the basis of a refusal to dismiss an action where failure to answer resulted from the attorney's negligence.[14] But in such a situation less stringent sanctions are appropriate, and even the milder penalties confer benefits on the non-defaulting party. Though the general rule is that a party instituting an action may discontinue it by voluntary nonsuit at any time up to a prescribed point,[15] usually submission of the case to the chancellor or a jury,[16] most courts refuse to allow such a nonsuit where the defendant would be prejudiced or deprived of an advantage he should justly be allowed to retain.[17] The majority of these courts, however, refuse to allow the mere possibility that the defendant may be forced to further litigation to interfere with the plaintiff's right to nonsuit.[18] Some courts go so far as to require that the defendant be requesting affirmative relief.[19]

Mississippi enacted discovery statutes in the last century very similar in scope to those that exist today with the exception of the 1956 amendment to section 1712.[20] Each procedure has its necessary sanction for noncompliance. Where a party fails to comply with an order for a bill of particulars, the court may refuse to admit evidence at the trial on the matter not so specified.[21] One failing to comply with a bill of discovery in chancery may be personally attached and brought in by force, or have property attached, or suffer a decree pro confesso.[22] If still recalcitrant, he may be jailed until he agrees to co-operate.[23] A party failing to honor a subpoena issued in deposition procedures[24] or refusing to honor a subpoena *duces tecum*[25] meets statutory sanctions for failure to respond to proper subpoena. Under these statutes the defaulting party may be physically attached, suffer default on a posted

318, 120 A.2d 880, 884 (1956).

[9]*E.g.*, Charlstedt v. Rohsenberger, 43 Ind. App. 263, 85 N.E. 996 (1908).

[10]*E.g.*, Melvin v. Scowley, 213 Ala. 414, 104 So. 817, 820 (1925).

[11]*Ibid.*

[12]Dawson v. Callaway, 31 Ga. 47 (1859).

[13]*E.g.*, *In re* Wozar's Estate, 34 N.J. Super. 133, 111 A.2d 768, 771 (1955).

[14]Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., 22 F.R.D. 302, 304 (S.D. N.Y. 1958).

[15]See Hartquist v. Tamiami Trail Tours, Inc., 139 Fla. 328, 190 So. 533, 540 (1939).

[16]10 Miss. L.J. 327, 328.

[17]*E.g.*, Electrical Accumulator Co. v. Brush Elec. Co., 44 Fed. 602, 604 (C.C.N.D. Ohio 1890).

[18]Pullman's Palace Car Co. v. Central Transp. Co., 171 U.S. 138, 146 (1898).

[19]Fender v. Hendley, 196 Ga. 512, 26 S.E.2d 887, 888 (1943).

[20]Fant, *Procedural Reform in Mississippi*, 34 Miss. L.J. 40, 46 (1962).

[21]Miss. Code Ann. § 1499 (1956).

[22]Griffith, Mississippi Chancery Practice, § 258 (2d ed. 1960).

[23]Miss. Code Ann. § 1298 (1956).

[24]Miss. Code Ann. § 1885 (1956).

[25]Miss. Code Ann. § 1658 (1956).

recognizance or bond,[26] be fined up to five hundred dollars,[27] or be jailed.[28] The statute which provides for inspecting and copying books, papers, and documents specifies that the court may: cite for contempt; refuse to allow the material to be given in evidence by the party in default; dismiss the cause of action if the defaulting party be the plaintiff; or enter a decree by default or confession against such party if he be the defendant.[29] Amended section 1712 has the most restrictive sanctions. The court may dismiss the plea, have the answer or plea taken off the file and enter a default judgment, or have the bill taken as confessed.[30] Realizing the severity of this statute, the legislature altered the language in the 1956 amendment and gave the trial judge the right to extend the time for answering "for good cause shown." In an early case under the prior version of the statute the court, without consideration for the circumstances, upheld a dismissal for failure to answer interrogatories.[31] Recent courts, however, have agreed with the majority,[32] and have refused to dismiss where there were partial answers and the failures were not intentional,[33] or where the defaulting party objected to the propriety of questions and after being overruled was not given sufficient time to file answers.[34] As to the plaintiff's right to voluntary nonsuit, Mississippi follows the general rule that whenever the defendant acquires substantial advantage by the course of the trial he may defeat the plaintiff's right to nonsuit.[35] A survey of the authorities, however, tends to indicate that the position has been largely confined to chancery cases wherein the defendant had become entitled to affirmative relief,[36] or where substantative rights had accrued to him during the trial prior to the motion to nonsuit.[37]

Though the court's refusal to grant a prejudicial dismissal in the instant case is in accord with almost every authority, the theory under which it was forced to base its decision is unfortunate. To say that strict negligence on the part of an attorney should afford him additional time to answer under a statute which provides for an extention "for good cause shown" is an extreme construction of the statute. Yet to allow

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[26]MISS. CODE ANN. § 1888 (1956).

[27]MISS. CODE ANN. § 1889 (1956).

[28]MISS. CODE ANN. § 1696 (1956).

[29]MISS. CODE ANN. § 1659 (1956).

[30]MISS. CODE ANN. § 1712 (1956).

[31]Cedar Rapids Nat'l Bank v. Murray, 98 Miss. 123, 53 So. 393 (1910).

[32]Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., 22 F.R.D. 302, 304 (S.D.N.Y. 1958).

[33]See Smithers v. Metropolitan Discount Co., 124 Miss. 833, 840, 87 So. 284, 285 (1921); Higgins Lumber & Export Co. v. Price, 120 Miss. 123, 81 So. 787 (1919).

[34]See Keathley v. Hancock, 212 Miss. 1, 14, 53 So. 2d 29, 33 (1951).

[35]*E.g.*, Adams v. Lucedale Commercial Co., 113 Miss. 608, 74 So. 435 (1917).

[36]See Mitchell v. Film Transit Co., 194 Miss. 550, 556, 13 So. 2d 154, 156 (1943); Canadian & Am. Mortgage & Trust Co. v. Fitzpatrick, 71 Miss. 347, 350, 14 So. 270, 271 (1893).

[37]See People's Bank in Liquidation v. Pennington, 137 Miss. 653, 689, 102 So. 386, 387 (1925); Northern v. Scruggs, 118 Miss. 353, 79 So. 227 (1918); State v. Hemingway, 69 Miss. 491, 10 So. 575 (1891).

the plaintiff to fail to answer proper interrogatories and suffer no penalty except possible court cost seems to invite violation of the statute. A party who does not want to answer certain questions is tempted to ignore the interrogatories in hope that the opposing party will fail to demand them. The best solution to this problem would appear to be the enactment of a wider range of sanctions so as to allow the trial judge to impose less severe penalties where the default was not willful. The trial judge in the present case tried to protect the defendant and penalize the plaintiff by granting the defendant the right to go on to trial at that term of court. Another solution might be to extend the defendant's ability to defeat an attempted nonsuit by the plaintiff to cases where a right of this nature has been granted. One court has gone so far as to assess the nonsuiting plaintiff with defendant's preparation costs where they have been substantial.[38]

Alfred G. Nichols, Jr.

Taxation—Widow's Allowance Taxable under Sixteenth Amendment and Internal Revenue Code

Widow received an allowance from her husband's estate pursuant to a court order and under the authority of a state statute giving the court a discretionary power to make the payments for her support during the estate's administration. The estate paid the allowance solely from *income,* taking a deduction for the amount to be distributed. Widow paid the Commissioner's assessed deficiency and filed a claim for a refund in the Federal District Court of Arizona. The case was decided in favor of the taxpayer, upon a motion for summary judgment by both parties, and without a written opinion. Held: Reversed. Widow's allowance received from income of an estate by court order was income within the sixteenth amendment and was taxable under the Internal Revenue Code. *United States v. James,* 333 F.2d 748 (9th Cir. 1964), *petition for cert. filed,* 33 U.S.L. Week 3092 (U.S. Sept. 16, 1964) (No. 507).

The word "income" was used in the sixteenth amendment, but was not defined there, nor exclusively defined anywhere in the Code.[1] In *Eisner v. Macomber,*[2] the Supreme Court laid down the definition that "income" ought to be considered "as the gain derived from capital, from labor, or from both." In *Buck v. McLaughlin,*[3] a court-ordered widow's allowance paid from either corpus or income was held not to be taxable to the widow under this definition. The *Eisner* definition which arose in connection with the taxability of stock dividends was soon questioned[4] and later avoided by *United States v. Kirby Lumber*

[38]Concrete Mixing & Conveying Co. v. Great Western Power Co., 46 F.2d 331 (N.D. Cal. 1928).

[1]Int. Rev. Code of 1954, § 61(a).

[2]252 U.S. 189, 207 (1920).

[3]48 F.2d 135 (9th Cir. 1931).

[4]C. A. Hawkins, 6 B.T.A. 1023 (1927); see, *The Supreme Court's Apparant Abandonment of a Definitive Concept of Taxable Income,* 45 Harv. L. Rev. 1072 (1932).

Co.,[5] a case declaring that "income" as used in the sixteenth amendment meant income in its ordinary and common sense meaning. The *Kirby* case was decided in November, 1931, but followed the *Buck* decision which was decided in March, 1931. The concept that "income" is to be interpreted in its broad sense was adopted in *United States v. Safety Car Heating & Lighting Co.*,[6] in 1936, and has continued to be applied by the courts.[7] The *Eisner* definition has been expressly limited in several cases involving windfalls[8] and illegal gains.[9] *Eisner* has not been overruled, but distinctions have limited its sphere of influence primarily to the field of stock dividends.[10] "Income" is not a fixed concept but is dynamic and flexible as a matter of necessity[11] and is to be determined according to the circumstances of each case.[12]

One of the fundamentals of federal income taxation is that any item of receipt or gain is includible in gross income, unless the taxpayer can point to a specific section of the Code excluding the item.[13] A principle underlying the taxation of estates is that all income of an estate is taxable to the estate or to the beneficiary.[14] The conduit scheme of taxation is an attempt to shift the incident of taxation of an estate to the ultimate recipient, by making amounts deductible by the state taxable to the beneficiary.[15] When amounts paid from an estate exceed "distributable net income," which is taxable net income with a few minor adjustments, a problem of apportionment arises between the taxable amounts of income distributions and the non-taxable amounts of corpus distributions.[16] If an amount is paid or credited to the beneficiary solely from the income of the estate, no problem of apportionment exists, for the entire sum is taxable to the beneficiary.[17] A deduction is allowed the estate when the payment of a widow's allowance is from income alone.[18] If a widow's allowance is paid solely or partially from the corpus of an estate, the Treasury Regulations imply that the estate will not be permitted the deduction to the extent that the allowance is paid from the corpus.[19] Under section 661(a) of the Code, *all* amounts distributed from the corpus of an estate are deductible; it is difficult to conceive why a widow's allowance should be treated any differently than other distributions from an estate corpus.[20] Congress has declared in section 102(a) of the Code that gifts, bequests, devises, or inheritances

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[5]284 U.S. 1 (1931).

[6]297 U.S. 88, 99 (1936).

[7]*E.g.*, Heard v. Commissioner, 326 F.2d 962, 966 (8th Cir. 1964).

[8]Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

[9]James v. United States, 366 U.S. 213 (1961).

[10]Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

[11]MAGILL, TAXABLE INCOME 67 (1st ed. 1936).

[12]1 Mertens, FEDERAL INCOME TAXATION § 5.03 (1962 rev.).

[13]Irwin v. Gavit, 268 U.S. 161 (1925).

[14]Helvering v. Butterworth, 290 U.S. 365, 369 (1933).

[15]INT. REV. CODE OF 1954, §§ 661-3.

[16]INT. REV. CODE OF 1954, § 662.

[17]*Ibid.*

[18]Treas. Reg. § 1.661(a)-2e (1956).

[19]*Ibid.*

[20]Mahon, *The Widow's Allowance and the Federal Tax Laws*, 41 TAXES 692, 696 (1963).

are not includible in gross income, but section 102(b) of the Code provides that the income from such gifts, bequests, devises, or inheritances is taxable. Under section 102(b) a widow's allowance paid from income of an estate would clearly be taxable, except for section 662 which states that income distributions of an estate are taxable to the "beneficiary." A widow's allowance paid by court order or decree does not fall squarely within the estate terminology meaning of "beneficiary"; however, there are broader definitions which include any person who receives a benefit or advantage.[21] The Code defines "beneficiary" to "include heir, legatee, and devisee."[22] Section 7701(b) states that the word "includes" when used in the Code is not exclusive; accordingly, "beneficiary" is not necessarily limited to heirs, legatees, and devisees. The Treasury Regulations give several examples of the word "beneficiary," none of which are really akin to a widow's allowance.[23] Several cases have held that a court-ordered widow's allowance is not received as an heir, legatee, devisee, or "beneficiary," but purely as the result of a statutory right.[24]

The taxpayers' contentions in the principal case were anchored on the *Buck* decision and the meaning of the word "beneficiary" as used in the Code. The *Buck* decision[25] was decided in the alternative: one basis was that a widow's allowance did not fall within the *Eisner v. Macomber* definition of "income," which definition has been eroded by subsequent decisions; the other basis was that a widow's allowance was analogous to alimony payments which were not taxable at that time,[26] but are now.[27] By expressly overruling any part of *Buck* which might conflict with *James*, the court was free to prevent the income of an estate from slipping through the Commissioner's fingers. Even though the widow's allowance did not fall exactly within the meaning of "beneficiary" as used in the Code, neither could the taxpayer point to any specific section excluding the item; thus, the widow's allowance fell victim to the general rule of includibility.

Nick Mavar, Jr.

Workmen's Compensation—Special Out-of-State Employer of Truck Driver Liable for Death Benefits Under Mississippi's Workmen's Compensation Act

Deceased, a resident of Gulfport, Mississippi, was shot and killed in Ohio while returning from a trip for Burnham Van Service, a Georgia trucking corporation. Burnham had leased the truck and driver from a Mississippi firm for use in interstate moving, the lease agreement being executed in Mississippi. The lower court affirmed an order of

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[21]Ballentine, Law Dictionary (1930).

[22]Int. Rev. Code of 1954, § 643(c).

[23]Treas. Reg. § 1.643(c) (1956).

[24]*E.g.*, Estate of Charles H. Franklin, 43 B.T.A. 612, 616 (1941). Mississippi also grants a widow's allowance as a matter of statutory right, Miss. Code Ann. § 561 (1956).

[25]Buck v. McLaughlin, 48 F.2d 135 (9th Cir. 1931).

[26]Gould v. Gould, 245 U.S. 151 (1917).

[27]Fairbanks v. Commissioner, 191 F.2d 680 (9th Cir. 1951).

the Mississippi Workmen's Compensation Commission holding Burnham to be liable for death benefits under Mississippi's Workmen's Compensation Act. HELD: Affirmed. Special out-of-state employer of truck driver is liable under Mississippi's Workmen's Compensation Act for death benefits where fatal injury is suffered by a driver within the scope of his employment while out of Mississippi. *Burnham Van Service, Inc. v. Dependents of Moore*, 164 So. 2d 733 (Miss. 1964).

The Mississippi Workmen's Compensation Act is applicable only when the relation of employer-employee can be established, and the employer's liability is limited to disability or death arising out of and in the course of employment.[1] It is frequently said in the common law of master and servant, and in workmen's compensation law, that the fundamental test of the employment relation is the right of the employer to control the details of the work, and that all other tests are subordinate and secondary.[2] The Mississippi Supreme Court has stated that the ordinary common law tests of the master-servant relation should be applied,[3] but has later added that a more liberal rule should govern compensation cases.[4] The modern tendency in workmen's compensation proceedings is to find employers liable when the work being done is an integral part of the regular business of the employer, and when the employer limits his activity solely to the business of the employer.[5] One court, faced with the problem of whether extraterritorial effect should be given the workmen's compensation statute, held that such a determination was dependent on the establishment of an employment relationship within the state.[6]

The general rule of construction is that unless the workmen's compensation legislation specifically excludes extraterritorial application, the particular act will be construed as having extraterritorial effect.[7] One court has stated that notwithstanding the fact that extraterritorial stipulations were excluded from the act, when the contract of employment was made within the state, the act will apply even though the employee was injured in another state or in a foreign country.[8] However, in another jurisdiction the local compensation act was held inapplicable where the contract was signed within the state, but the employer lived outside the state and the injury occurred outside the state.[9] The Mississippi Workmen's Compensation Act allows compensation in cases where the assignment of work in the foreign state is temporary and the injury occurs within a period of six months after leaving the state, unless within this period, the employer files with the state commission notice that he has elected to extend coverage for a greater period of time.[10] Where a citizen of a foreign state was employed in Mississippi, but was temporarily transferred to another state,

[1]DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 68 (1957).
[2]1 LARSON, WORKMEN'S COMPENSATION § 44 (1952).
[3]Carr v. Crabtree, 212 Miss. 656, 55 So. 2d 408 (1951).
[4]Sones v. Southern Lumber Co., 215 Miss. 148, 60 So. 2d 582 (1952).
[5]Shumpert Truck Lines v. Horne, 227 Miss. 648, 86 So. 2d 499 (1956).
[6]Pound v. Gaulding, 237 Ala. 387, 187 So. 468 (1939).
[7]Festervand v. Laster, 15 La. App. 159, 130 So. 634 (1930).
[8]McKane v. New Amsterdam Cas. Co., 199 So. 175 (La. 1940).
[9]Watts v. Long, 116 Neb. 656, 218 N.W. 410 (1928).
[10]MISS. CODE ANN. § 6998-55 (1956).

the court held that the employee was entitled to compensation under the Mississippi Act.[11] The court has further held that even though the employer and employee were residents of another state, and the employee was injured while passing through Mississippi, the employee was covered by the Mississippi Act.[12] It has been said that the two most common grounds for applying the local statute are the making of the contract within the state and the existence of the employment relation within the state.[13] These two factors are often supplemented by consideration of the employee's residence and the localization of the employer's business.[14]

The Mississippi Supreme Court has followed the trend of applying a liberal interpretation to workmen's compensation statutes in establishing the employer-employee relation[15] and in extending the extraterritorial coverage of the statute.[16] In an attempt to protect citizens of this state who are injured out of the state, and Mississippians who render care to citizens of other states who are injured within this state, the court must apply the broadest and most liberal interpretation of the statute available. It is submitted that care should be taken in broadening the effect of the statute so as not to invade the independent contractor status and to avoid encroachment of the coverage supplied by the acts of other states.

Robert C. Khayat

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[11]Houston Contracting Co. v. Reed, 231 Miss. 213, 95 So. 2d 231 (1957).

[12]Mandle v. Kelly, 229 Miss. 327, 90 So. 2d 645 (1956).

[13]2 LARSON, WORKMEN'S COMPENSATION § 87 (1952).

[14]*Ibid.*

[15]See, *e.g.*, Wade v. Traxler Gravel Co., 232 Miss. 592, 100 So. 2d 103 (1958).

[16]Winborn v. R.B. Tyler Co., 231 Miss. 166, 94 So. 2d 340 (1957).

RECENT BOOKS

LAW AND PUBLIC ORDER IN SPACE. Myres S. McDougal, Harold D. Lasswell, and Ivan A. Vlasic. New Haven and London: Yale University Press, 1963. Pp. xxvi, 1147. $15.00.

The old riddle asking "How high is up" has become a serious new question in the space age. Nations that claim jealous ownership of the near air space join in recognizing the more distant reaches of the sky, already criss-crossed with the paths of orbiting satellites, as "common pasture."

If, as is almost universally recognized, rules for space travel must differ from those currently regulating air travel, any consideration of space must include a means by which to distinguish both legally and physically the one from the other. We would welcome, perhaps, some easily-recognized diaphragm separating air space from outer space. Since there is none, an affirmative answer to whether some artificial delineation is necessary, raises the further question of where or how the distinction should be made. It might seem reasonable to assign an arbitrarily-selected distance out from the earth's surface as the dividing point, but the disputes over territorial seas and baselines suggest that such a "solution" in fact merely substitutes a new set of problems. Some experts have suggested that the entrance to outer space could be set at the height of some seventy miles, below which an orbiting satellite must fall back to earth.[1] Others prefer to put the demarcation level at that height (postulated as 50 earth radii) where terrestrial gravity is no longer an effective force.[2] Still others would set the critical point at the upper limits attainable by "air-breathing" vehicles of flight.[3] These and many other proposals that would establish, at heights of from 10 miles[4] to 50,000 miles,[5] a boundary between state-regulated air space and the freeways of outer space are basically techniques for measurement rather than reasons in terms of common interest for establishment of an ascertainable line of demarcation. Their very abundance and disparity demonstrate the futility of trying to achieve certainty by arbitrarily selecting any single guide-post, however well defined it might be. The standard itself may be subject to fluctuation, just as the continental-shelf line, based primarily on offshore accessibility, is indirectly projected further from shore by every new development in submarine technology.[6]

To space-related quandaries such as this much-debated boundary problem, Professors Myres S. McDougal and Harold D. Lasswell of Yale, and Ivan A. Vlasic of McGill, have applied their notable talents

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[1] McDougal, Lasswell & Vlasic, Law And Public Order In Space 336 (1963) [hereinafter cited as Space Book].

[2] Space Book 347.

[3] *Id.* at 333.

[4] *Id.* at 332.

[5] *Id.* at 349.

[6] See, *e.g.*, Cousteau, *At Home In The Sea*, 125 National Geographic Magazine 465, April 1964, and Link, *Tomorrow On The Deep Frontier*, 125 National Geographic Magazine 778, June 1964.

in the latest of a continuing series of policy-oriented inquiries into law and public order. *Law and Public Order in Space*[7] is neither a textbook nor a non-stop cover-to-cover galactic tour. Yet it contains seeds enough to sprout many a text, and the astrologic projections that entrance the reader when he turns to the working inside front cover, preface a factual overshadowing of the best imaginations of science fiction.

The *Space Book* is, as anyone who knows the authors would expect, a comprehensive, competent application of policy-science techniques: to identify and clarify the more important legal problems created by our increasing space competence; to appraise the trends in past decisions on these and comparable problems; to analyze the factors responsible for such trends; to project the probable future course of events; and to suggest worthwhile alternatives of policy and procedure. It aims at the major goal, to which McDougal and Lasswell have dedicated their efforts over the years, of promoting a world public order of greater human dignity; and it seeks to make this goal realistic with respect to specific space-related problems. The authors hope to advance this goal by recommending principles and procedures that place a major emphasis on persuasion rather than on naked force as the most effective means by which to achieve the dominant needs and desires to the world community.

As the problem of air space suggests, man's efforts at legal construction often lead to a confusion which works against his best interests. Intolerant of such wasteful outcomes, the authors meticulously lay bare the underlying misconceptions which pervade man's struggles to prescribe order for his escalating interactions in the earth-space arena. To increase the realism of their study, McDougal and Lasswell have perfected and the authors here employ their own special template by which they isolate and analyze all facts pertinent to each subject of inquiry. These are catalogued into three interrelated classifications: the process of interaction, the process of claims to authority arising therefrom, and the responding process of decision-making about such claims. For each of these processes they use an eight-count pattern of inquiry, examining the participants, their objectives, the situations within which those objectives are sought, and the base values (generalized into eight common value-goals, such as power, wealth, and well-being) employed in these various situations to achieve the objectives desired. The strategies by which the base values are used, the immediate outcomes, and the long-range effects of those strategic efforts are scrutinized. Taken into account also are the conditions under which the processes occur.

After developing their format in the first chapter, the authors seek to clarify community policies, characterized as inclusive and exclusive, by distinguishing common from special egocentric interests. They urge the protection of common interests and the rejection of special interests. This does not mean that exclusive community interests must be rejected, for these are within the realm of common interests, and are to be appropriately balanced with inclusive interests of the world community as a whole. For example, the inclusive right to the use of space as a travel medium (subject to traffic control, etc.) is properly to be balanced by the exercise of a reasonably comprehensive authority over national

[7]Hereinafter cited in the text as *Space Book*.

airspace, and, where necessary to protect internal value processes, an exercise of occasional exclusive authority over the craft of other states far out into space may be in the common interest.[8] But the authors would recommend rejection of a demand for special authority of a permanent nature to control all wave-lengths suitable for space communication in that portion of space directly over a nation-state as an impermissible interference with the common interest in exploiting space.

The major portion of the book is devoted to identifying trends indicated by and the factors that influenced past decision and to projecting the effect of these patterns on the future. The procedure used resembles an unexpurgated version of the basic creed for cub reporters, the demand to pin down who, what, where, when, and why. It develops, chapter by chapter, the details of why who can use what space for what purposes at what times;[9] what minimum order must be maintained;[10] when optimum order can be achieved;[11] what nationality a spacecraft can claim;[12] who has jurisdiction over its orbit and over its passengers;[13] what resources in space can be used by whom;[14] and to what extent business enterprises using those resources must be controlled for what reasons.[15] The future byplay between humans and "advanced forms of non-earth life" are boldly considered in terms of beings below, equal to or above human levels of intelligence.[16] In the final chapter the authors offer their own appraisals of the existing constitutive process of decision and recommend alternatives for achieving both a minimum and an optimum public order for space.

In accord with overwhelming contemporary opinion, the authors find that it is already the law that access to outer space is free and open to all on a basis of equality. They demonstrate that the traditional concepts of aggression and self-defense will pose new difficulties when oriented to the probable conditions of space activity. In outlining potential sanctions for violators of minimum order, the authors seek to create a comprehensive new map of inquiry about disarmament. Suggestive as the main features of this map are, it is to be regretted that the *Space Book* does not deal with this subject in more specific detail.

To guide decisions about the protection of, the control over, and the responsibility for spacecraft, the authors suggest borrowing, from ships and aircraft, the concept of nationality. They make favorable reference to Mr. Justice Jackson's assertion that a state may "under international law determine for itself the conditions under which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it."[17] In the face of some contrary

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[8] SPACE BOOK 292-94.
[9] *Id.* at ch. 3.
[10] *Id.* at ch. 4.
[11] *Id.* at ch. 5.
[12] *Id.* at ch. 5.
[13] *Id.* at ch. 6.
[14] *Id.* at ch. 7.
[15] *Id.* at ch. 8.
[16] *Id.* at ch. 9.
[17] Lauritzen v. Larson, 345 U.S. 571, 584 (1953).

European opinion they vigorously reject the conception of "genuine link" as a limitation on nationality. One hopes that the "irrelevant derivation"[18] which the 1958 Geneva Convention on the High Seas extracted from the *Nottebohm*[19] decision will, by such rejections, be prevented from subjecting the competence of states to bestow their nationality on spacecraft to the arbitrary, unilateral questioning of other states.

In their discussion of jurisdictional problems, the authors draw upon many analogies from public and private international law in an effort to penetrate traditional principles to reach their underlying fundamental policies. For the accommodation of conflicting claims, they offer, in line with many modern scholars, a comprehensive check list of points for determining the substantial interests of the claimants.

Examining probable claims with respect to the acquisition and control of resources, the authors consider both what resources may be subjected to exclusive appropriation, and the means by which any permissible appropriation may be effected. They conclude that very few resources may be made subject to appropriation and that a most severe requirement of effective occupation be the principal modality for all permissible appropriation.

In a study of "enterprisory activities" the authors range over the many legal problems of international organization which may arise when either the general community or lesser groupings of states directly undertake the exploitation of space resources. In many of their recommendations upon these latter problems the authors build upon the distinguished work of Mr. Wilfred C. Jenks.

The authors achieve a considerable condensation in their presentation of all these complex problems by the use of a special vocabulary. It is disappointing to find legally-trained critics, whose functional lives evolve around a special vocabulary, complain, as some have done,[20] over the need to devote a little effort to acquire the precision tools of the Public Order vocabulary. Even an apprentice carpenter develops quickly a competence with the special vocabulary of his trade, and soon distinguishes with facility between fascia and frieze, between stool and sill, between rake and eave. The terminology of policy-science, much simpler and more readily understood, opens the doorway not only to a refreshing clarity of communication, but to the new school of international law pioneered by Professor McDougal. The "relevant, comprehensive framework of inquiry"[21] which was so effective in rewriting the law of the sea,[22] it here proved to have the flexibility to assimilate the 25th century problems that a half-generation of scientific progress succeeded in depositing in our laps 500 years before they were expected. It is well worth a much greater effort than is in fact needed to master the few technical words that structure the inquiry.

The scope of the *Space Book* effectively demonstrates that this check-list approach leaves very little, if any, relevant material undiscovered, and that its design capacity covers all situations, all contin-

[18] SPACE BOOK 552.

[19] 1955 I.C.J. Rep. 4.

[20] See, *e.g.*, Posner, Book Review, 77 HARV. L. REV. 137 (1964).

[21] Kenny, Book Review, 32 GEO. WASH. L. REV. 676, 677 (1964).

[22] McDOUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS (1962).

gencies. Some critics may react in the way of the little girl who, obliged to write to her grandmother a thank-you note for a gift-book about penguins, pensively inscribed, "This book tells more about penguins than I am interested in knowing." But this attention to detail, if it does detract from the pure entertainment value of the book, does also give it its tremendous value as a mother-lode of law and public order in space. It is one of those rare books that is enriched by use. Authoritative decision-makers concerned with legal problems involving space will turn instinctively to the *Space Book* for guidance. The policy recommendations made there will scout ahead for more than one generation in our trek towards the distant spheres.

Perhaps the greatest value of the *Space Book* lies at the point where unimaginative critics probe for weakness. For even in such far-out matters as how to deal with superior forms of life, just as in the more immediate problems such as are created by radioactive contamination from falling spacecraft, it documents its proposals with fact and precedent. Those who would insist that in law there is nothing new under the sun, will find the *Space Book* their best authority for further contending that there is very little that is new, even beyond the sun.

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BOOKS RECEIVED

THE AMERICAN LAW OF TREASON: REVOLUTIONARY AND EARLY NATIONAL ORIGINS. Bradley Chapin. Seattle: University of Washington Press, 1964. $6.00.

COMMERCIAL AND INVESTMENT PAPER. Roscoe Steffen. Brooklyn: The Foundation Press, Inc., 1964. Pp. 915.

THE COMMISSION AND THE COMMON LAW. H. Arnold Bennett. New York: Exposition Press, 1964. Pp. 115. $4.00.

THE DISINHERITED AND THE LAW. Dagobert D. Runes. New York: Philosophical Library, Inc., 1964. Pp. 79. $3.00.

FREE PRESS–FAIR TRIAL. Edited by Fred E. Inbau. Evanston, Illinois: Northwestern University Press, 1964. Pp. 202. $5.00.

HOW HIGH IS UP? David Loth and Morris L. Ernst. New York: Bobbs-Merill Co., Inc., 1964. Pp. 275. $4.50.

JUDICIAL BEHAVIOR. Edited by Glendon Schubert. Chicago, Illinois: Rand McNally & Company, 1964. Pp. 603. $8.50.

MANAGING THE LAW OFFICE. Edited by Daniel S. Cantor. Mundelein, Illinois: Callaghan & Company, 1964. Pp. 296. $18.50.

PENSIONS AND PROFIT SHARING. Washington, D.C.: BNA Inc., 1964. $9.75.

PROCEEDINGS OF THE CONFERENCE ON SPACE SCIENCE AND SPACE LAW. Edited by Mortimer D. Schwartz. South Hackensack, N.J.: Fred B. Rothman & Co., 1964. Pp. 176. $6.75.

PUBLIC MONEY SOURCES FOR OVERSEAS TRADE AND INVESTMENT. John E. Loomis. Washington, D.C.: BNA Inc., 1963. Pp. 243. $16.50.

THE ROBINSON-PATMAN ACT. Daniel J. Baum. Syracuse: Syracuse University Press, 1964. Pp. 153. $5.75.

SEARCH AND SEIZURE. Nathan R. Sobel. Jamaica, N.Y.: Gould Publications, 1964. Pp. 142. $4.00.

SPECIALIZATION IN THE MEDICAL AND LEGAL PROFESSIONS. Glenn Greenwood and Robert F. Frederickson. Mundelein, Illinois: Callaghan & Company, 1964. Pp. 210. $5.00.

STATE FAIR EMPLOYMENT LAWS AND THEIR ADMINISTRATION. Washington, D.C.: BNA Inc., 1964. Pp. 285. $6.50.

THE SUPREME COURT AND PUBLIC PRAYER. Charles E. Rice. Bronx, N.Y.: Fordham University Press, 1964. Pp. 196. $5.00.

UNIONIZATION ATTEMPTS IN SMALL ENTERPRISES. Morton Gitelman. Chicago, Illinois: Callaghan & Company, 1963. Pp. 185. $12.50.

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